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HARVA  ARY

OHIO
CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME VIII.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1906.

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JUDGES OF THE CIRCUIT COURTS OF OHIO

FROM FEBRUARY 9, 1906, TO FEBRUARY 9, 1907.

HON. HARRISON WILSON, *Chief Justice*, Sidney, Ohio.
HON. THOMAS A. JONES, *Secretary*, Jackson, Ohio.

FIRST CIRCUIT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

WILLIAM S. GIFFEN.....Hamilton
FERDINAND JELKE, JR.....Cincinnati.
PETER F. SWING.....Cincinnati

SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

THEODORE SULLIVANTroy.
HARRISON WILSONSidney
CHARLES W. DUSTIN.....Dayton.

THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Faulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

CALEB H. NORRIS.....Marion.
SILAS E. HURINFindlay
MICHAEL DONNELLY.....Napoleon

FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

THOMAS CHERRINGTONIronton.
THOMAS A. JONES.....Jackson.
FESTUS WALTERSCircleville.

FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knor,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

MAURICE H. DONAHUE.....New Lexington.
THOMAS T. MCCARTY.....Canton.
FRANK TAGGARTWooster

SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

ROBERT S. PARKER.....Bowling Green
GEORGE R. HAYNES.....Toledo.
SAMUEL A. WILDMANNorwalk

SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

PETER A. LAUBIE.....Salem
JOHN M. COOK.....Steubenville
JEROME B. BURROWS.....Painesville

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

LOUIS H. WINCH.....Cleveland
ULYSSES L. MARVIN.....Akron
FREDERICK A. HENRYCleveland

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OHIO CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME VIII.

CAUSES ARGUED AND DETERMINED IN THE CIRCUIT
COURTS OF OHIO.

VALIDITY OF CONTRACT FOR CONSTRUCTION OF WATER WORKS.

[Circuit Court of Lucas County.]

HOMER T. YARYAN, A TAX-PAYER, ETC., V. THE CITY OF
TOLEDO ET AL.

Decided, March 31, 1906.

Municipal Corporations—Legislative Power not Delegated, When—Construction of the Phrase "Lowest and Best Bidder"—Discretionary Power of Board of Public Service in the Award of Contracts—Specifications for Public Work—Deviation as to Materials and Construction—Bids as a Whole and Separate Bids—Sections 794, Revised Statutes, and 143 Municipal Code—Appropriation of Sum Less than Needed not an Abuse of Power, When—Municipal Water Works—Suit by Tax-payer to Enjoin Carrying Out of Contract.

1. The preparation by the board of public service of plans, estimates, specifications and profiles for a new municipal water works system, in accordance with a determining ordinance by council, is not an exercise of legislative power, and authority so to do is conferred upon such board and may be exercised by it, notwithstanding Section 127 of the Municipal Code which provides that all power unless otherwise provided is to be exercised by council.

2. The provision of Section 143 of the Municipal Code that the board of public service shall make a contract with the lowest and best bidder, or may reject any and all bids, does not limit the board to a mathematical computation as to who is the lowest responsible bidder, but permits the board to go beyond the price bid and the character of the bidder, and to accept the best proposition offered, considering quality, feasibility and efficiency of the thing to be furnished, the qualifications and responsibility of the bidder, and the price proposed in view of all the other considerations.
3. Where the work is of the character involved in the building of an extensive municipal water works plant, it is not necessary that the specifications to be submitted to the bidders should go into any greater detail than is required to make the matter intelligent to persons competent to do the work and furnish the materials.
4. Such a contract is not rendered invalid by reason of failure to comply with Section 794, Revised Statutes, providing that municipal officers shall require separate bids for contract work or materials, where it does not appear that separate bids were received covering the whole work to be performed and materials to be furnished amounting to less in the aggregate than the amount of the bid for the work as a whole which has been accepted.
5. The fact that council limited the amount for which contracts could be let to the sum then available for that purpose, whereas a much larger sum will eventually be needed to complete the system, does not indicate that council has no intention of making a further appropriation at some future date, and the letting of a contract for a part of the system within the limitation, is not an abuse of power.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

This action was begun in the court of common pleas to enjoin the carrying out of a contract entered into between the Board of Public Service of the City of Toledo and the Norwood Engineering Company, on the 6th of November, 1905, whereby the latter agreed to construct part of an extension of the Toledo water works system, for a certain compensation agreed upon, to be paid by the city. The case was tried in that court and appealed to this court. The person who was the city solicitor at the time this action was begun, Mr. U. G. Denman, upon application to him, declined to institute the suit, and thereupon a tax-payer began the suit, as he is permitted to do by the statute. The suit was instituted on December 5th, 1905. The petition, in the first instance, was filed against the city, the city

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treasurer, the city auditor and the members of the board of public service. On their respective applications the Norwood Engineering Company, the principal contractor, and A. Bentley & Son, sub-contractors, were brought in as defendants with leave to answer. The petition sets forth eighteen separate grounds of objection to the proceeding up to and including the letting of the contract, any one of which it is said challenges what amounts to such irregularity and disregard of mandatory conditions and restrictions imposed by law as renders the contract illegal and nugatory and calls upon the court to prevent its performance, and an additional ground is stated in an amendment to the petition.

The city, through Mr. Denman, as city solicitor, filed an answer in which it controverts these allegations of irregularity and invalidity, and the city treasurer filed a like answer. Subsequently a new council came into office and the personnel of the different offices changed, and new officers were substituted in the record for those who had gone out; and a new city solicitor succeeded Mr. Denman in office, to-wit, Mr. Northup, who obtained leave and filed an answer and cross-petition for the city in which it admits all the matters set forth in the petition, repeating the same and adding some other alleged irregularities and illegalities in the procedure, and joins in the prayer for an injunction and for nullifying of the contract. Upon all material averments of the petition and cross-petitions, the Norwood Engineering Company and A. Bentley & Son, by their separate answers—which are substantially alike in form—joined issue with the plaintiff and the city. They also allege certain facts and circumstances of the transaction, especially as to the acquiescence of the plaintiff and the city in the work going forward, to a degree, before the suit was instituted, which are relied upon as establishing a waiver or estoppel.

These allegations of new matter are met by a denial. The case has been tried in this court and it has developed that there are no material facts in dispute, but that all important differences arise out of different constructions put upon the laws and ordinances bearing upon the transactions in question. It also appears that specifications of alleged material irregularities

are, in many instances, due to varied statements of the same thing, and an analysis thereof in so far as the evidence adduced tends to sustain the same, permits of their reduction to four general heads. Before stating or discussing these, however, I will attempt to give a brief history of the matters out of which this controversy has arisen as the same is disclosed to us by the pleadings and the evidence.

It appears that as early as the spring or summer of 1902 the question of increasing and purifying the water supply of the city and its inhabitants for domestic and other uses had engaged the attention and interest of the public and the water works trustees to a degree that moved the latter to engage three eminent experts, Allen Hazen, G. H. Benzenberg and W. G. Clark, as an engineering commission to investigate and report upon the matter. The scope of their commission is best set forth in a letter addressed to them by the water works trustees on the subject; it is as follows:

“WATER WORKS DEPARTMENT,
“CITY OF TOLEDO.

“*Gentlemen*—The question which you are called upon to determine in connection with your investigation and study here, is the best method of securing for this rapidly growing city, an ample supply of clear, pure and wholesome water for domestic, manufacturing and municipal purposes.

“In your study of the subject you are to take into consideration all the schemes that have been proposed here, and any others that may suggest themselves to you, with a view of meeting the requirements of this city, for, say the next forty years. If some method should present itself which would be satisfactory for a limited time, say fifteen or twenty years, which possessed considerable economical advantages against a more permanent solution, we wish you to include same in your report, together with your recommendations for the immediate and future needs of the city, and the probable cost of each.

“All information heretofore gathered will be submitted to you, and whatever work, information or tests you may require to assist you in your investigation, will be furnished upon application to the board.

“(Signed) W. A. KUHLMAN, *Pres.*,
“HENRY KELLER,
“W. T. DAVIES,
“*Trustees.*”

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This commission, it appears, entered upon this investigation, and the result thereof is set forth in a printed report, in pamphlet form, of fifty-two pages, introduced in evidence as Exhibit "U." The date of the report is December 20, 1902. The pamphlet was printed some time in 1903, as it appears from the date on the back of it. It discloses that great skill, care and industry was devoted to the problem by the gentlemen of the commission, and the report sets forth very fully the various available sources of water supply for the city, various methods of bringing the same to the city, and various methods of purification, and the elements of cost of procuring the supply and purifying the same are set forth in each case separately as well as the cost of maintaining each system; and the comparative merits of different plans and systems in point both of cost and efficiency, are set forth. Their recommendation, after a discussion and consideration of the whole matter, is as follows:

"Upon a careful consideration of all questions bearing upon the proposed improved water supply for this city, your commission recommend that the Maumee river be continued as the source of supply, that the water be taken from the main channel in the river nearly opposite the house of the Country Club, and that for that purpose and for the location of the necessary purification works an effort be made to secure the golf course of the Country Club. Should it not be possible to secure said property, then we recommend that so much of the low ground north of the golf course be secured as may be necessary for a low-lift pumping station and a roadway from there to Broadway, and about twenty-five acres of land located anywhere along the west side of Broadway between a point west of the above proposed pumping station site and Delaware creek.

"We further recommend that upon these sites a low-lift pumping station and a suitable purification plant, with clear water reservoir suitably equipped and in conformity with the requirements as set forth in the above report as necessary for the next fifteen or twenty years, be erected and properly connected with each other and the main pumping station, as soon as possible. These works can thereafter be enlarged as the increased consumption may make it necessary, and the entire works should be designed in a comprehensive manner so as to permit such extension without causing any derangement of any of its existing parts.

“We further recommend that if at any time it should become possible for the city to secure the right to use water from the Miami & Erie Canal for a period of years, in quantity sufficient to supply the consumption, a suitable connection should be made between the canal and the coagulation basins and that the supply be taken from the canal, and that the necessary betterments along the canal, as indicated in our report, be made. The reduction in cost of operation will amount to about two dollars per million gallons drawn in this way.

“We further recommend that such purification plant be thereupon placed in charge of a competent and experienced person to operate it, and we are satisfied that the purified Maumee river water will prove to be an ample supply of pure and wholesome water. Respectfully submitted,

“(Signed) G. H. BENZENBERG,

“ALLEN HAZEN,

“WM. G. CLARK,

“*Engineering Commission.*”

The plan or system recommended by the engineering commission, and subsequently adopted by the council, and upon which the board of public service formulated plans and specifications and let the contract to the Norwood Engineering Company, is that known by the general description of the American Mechanical Filtration System, as distinguished from certain other general systems, including the English or Slow Sand Filtration System. Each of these general plans admits of considerable variation in matter of detail of construction and operation. Their estimate of the cost of such an addition to the water works plant as they recommended was \$1,204,390, but they set forth the cost of certain parts that they thought might be omitted for the present, amounting to \$431,200, reducing the cost to \$773,190.

These estimates are very much lower than those for other plants considered by them. In pursuance of this report, or, at least, agreeably to it, the council subsequently provided for the purchase of land in the vicinity described, for such purification plant, and about thirty acres were purchased at a cost of \$38,000. As to steps subsequently taken to carry out this project, I go to the undisputed history set forth in the pleadings, and I shall refer somewhat to the facts in evidence,

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and because it includes all that is set forth in the petition of the plaintiff, and somewhat more, I refer to the answer and cross-petition of the city. It is therein averred that on the 22d day of August, 1904, the council of the city of Toledo passed an ordinance—a copy of which is set forth in the pleadings—the title of which reads:

“An ordinance declaring it necessary to issue bonds for procuring real estate and right of way, and for extending, enlarging, improving, equipping, furnishing and securing a more complete enjoyment of the water works of the city of Toledo.”

The ordinance consists of but one section. I shall not stop to read it. However, it sets forth that it is deemed necessary to issue bonds to the amount of \$500,000 for the object stated; and the purpose of the council to provide therefor. Then on the 12th day of September, 1904, the council of the city passed an ordinance entitled, “An ordinance to provide for the issue of bonds of the city of Toledo, state of Ohio, to pay the cost and expense of procuring the necessary real estate and right of way for extending, enlarging, improving, equipping, furnishing and securing a more complete enjoyment of the water works of the city of Toledo,” and therein the issue of the \$500,000 of bonds is provided for, and their denominations, time of payment, rate of interest, method of sale, etc., are particularly set forth. It is alleged that these bonds were duly advertised and sold; that thereafter, on the 8th day of May, 1905, the council of the city passed an ordinance entitled as follows:

“An ordinance declaring the necessity for extending, enlarging and improving the present water works system of the city of Toledo and equipping and furnishing such extension and to secure a more complete enjoyment of the same by supplying pure and clear water to the city and the inhabitants thereof and authorizing a contract for the construction of certain parts thereof.”

The sections of this ordinance, being three in number, are preceded by a number of whereases. The whole ordinance is as follows:

“WHEREAS, the city of Toledo is now the owner of a system of water works for supplying water for its own use and its inhabitants, and

“WHEREAS, said system as it now exists is inadequate to meet the public demands and supply sufficient pure and wholesome water for the use of the city and persons desiring to use the same, and does not provide in any way for clarifying or purifying the water supply through it, and

“WHEREAS, it is deemed necessary for the public health and for the welfare otherwise of the inhabitants of the city of Toledo to install a system for the purification of water from the Maumee river for the use of the city and its inhabitants thereof, and

“WHEREAS, this subject has been given careful consideration by eminent engineers whose recommendations have been approved by the State Board of Health of the State of Ohio, and

“WHEREAS, certain other methods of purification have been suggested by certain parties,

“*Now Therefore*, Be it ordained by the council of the city of Toledo, state of Ohio,

“SECTION 1. That council hereby declares it to be necessary and that it is its intention to cause to be installed and constructed the necessary water works, to extend, enlarge and improve its present system of water works by means of the necessary intake piers in the Maumee river, conduits, aqueducts, reservoirs, pumps, machinery, buildings, filtration and purification plant and works and the necessary equipment and furnishings for the same to supply clear and wholesome water to the city and the inhabitants thereof, and all of said extensions, enlargement and improvement shall be connected with and made a part of the city's present water works system.

“SEC. 2. That council hereby gives its consent for and authorizes the construction and installation of said water works extension and all parts thereof and hereby authorizes and directs the Board of Public Service of the City of Toledo to advertise for a period of four (4) weeks for bids according to law for the construction of any or all parts of said water works extension and to let a contract or contracts to the lowest and best bidder or bidders for the construction and installation thereof or any of the parts of the same.

“All bids and proposals for any and all of said work shall be submitted and received in accordance with law and on forms and on blanks which will be furnished by the board of public service of the city, provided,

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“First. That bids shall be received, specifications prepared under the direction of the board of public service of the city in accordance with the plans heretofore approved by the State Board of Health of Ohio, for the city of Toledo, copies of which plan and their constructions are now on file in the office of the board of public service of the city and which are hereby approved.

“Second. That alternative bids and proposals shall be received for the installation of other systems of purifications than that provided for in the above mentioned plans to be furnished by the bidder under general conditions to be specified by the board of public service so as to insure a capacity for the purification of twenty million gallons of water every twenty-four hours and to provide for ready and economical expansion of the plant to an ultimate capacity of sixty million of gallons every twenty-four (24) hours and to secure in all cases a high grade of construction.

“Third. If a contract shall be awarded on any plan or system of purification which has not been demonstrated as successful with water of the character of that of the Maumee river, no payment shall be made by the city until the success has been demonstrated to the satisfaction of the board of public service, but in no case shall there be paid to the contractor for any system or plan more than eighty (80) per cent. of the value of the work already completed when partial payment shall be asked for and made and the value of said work so already completed shall be determined by the board of public service on the estimate of said board as to what proportion said completed work bears to the whole work to be done, and in all cases the contractor shall make entirely at his own expense such tests of the construction, practicability and efficiency of the plans and system by him installed as may be required by the board of public service to show to the satisfaction of said board that such plant and system will do the work represented and guaranteed by the contract or for it to do. In no case shall the final estimate for partial payment be made to the contractor for the plant and system installed until said satisfactory tests have been made and the work finally accepted by the board.

“Fourth. No bid shall be accepted until a bond is given to the city of Toledo, Ohio, to the approval of the board of public service as to the efficiency and amount and of the city solicitor as to form, and conditioned to save and protect the city of Toledo from any and all loss, damage, judgment and decrees from, through or in connection with the construction and installation of the plant system and against any increase over

the cost price provided for in the contract, and conditioned further that the contractor will protect, defend and save the city of Toledo from any and all damages and expense of litigation, judgments, and decrees incurred by, instituted or entered against it by persons, firms or corporations claiming patent rights or other rights on such plant or system or any part or parts thereof.

“Fifth. The board of public service may advertise for bids and let contract for such part or parts of said water works extension at such times and in such order as to said board shall be deemed for the best interest of the city in securing a first-class, good and economical construction, provided that contracts shall not be let for said water works extension, which in the aggregate amounts to more than five hundred and sixty-five thousand (\$565,000) dollars, which sum is now available in the treasury and which is hereby appropriated to meet such cost and expense from the money heretofore realized from the sale of bonds for the purpose and from the funds heretofore received as charges for water in the department of public service.

“Sixth. All bidders shall be required to state in their respective proposals at what time they will begin and complete the work, or said times may be fixed by the board of public service, and all profiles, plans and specifications for the work shall be expressly made a part of the contract therefor.

“SEC. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

“Passed May 8th, 1905.”

Thereafter, the said John Stolberg, Milton Taylor and John D. Nolen (I read from the cross-petition), as the board of public service of said city, duly separated the work and construction required to be done under and by virtue of such ordinance passed May 8, 1905, into eight (8) separate and distinct contracts as follows:

Contract No. 1. Being a contract for pumps and gas engines and other machinery for a pumping station necessary to be erected in connection with said plant.

Contract No. 2. Being Section 1 of the conduit system which said conduit system was necessary to conduct clear water from the filtration plant proper to the water works pumping station of said city.

Contract No. 3. Being the contract for the construction of Section 2 of said conduit system.

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Contract No. 4. Being the contract for the construction of the filtration plant proper in connection with said system, which was afterwards awarded to the defendant, the Norwood Engineering Company, as hereinafter set forth.

Contract No. 5. Being the contract for the construction of an office building on the site of the said filtration plant.

Contract No. 6. Being the contract for the installing of heating plant for said office building.

Contract No. 7. Being a contract for making certain borings in the earth for testing purposes.

Contract No. 8. Being a contract for Section 3 of said conduit system.

The cross-petition further says that after the 8th day of May, 1905, the board of public service caused to be published and circulated a legal advertisement and notice to bidders, which is therein recited. I will refer to this later. I call attention now to one clause appearing in it, which I may have occasion to discuss: "Copies of the plans, proposal forms, specifications and form of bonds and contract can be seen at the office of the chief engineer, Valentine building, Toledo, Ohio, or at the office of Consulting Engineer Chas. L. Parmalee, 136 Liberty street, New York."

This advertisement, I should mention, was for the letting of a contract for the construction of the water purification works, being contract No. 4, for the improvement of the water supply. In pursuance of this advertisement, which was very extensively published and circulated, numerous bids were received, seven of which are designed to be complete, covering the whole contract, and a number of others, for certain parts of the work comprised in contract No. 4. The pleading also states—and it appears as an admitted fact—that the bid of the Norwood Engineering Company to construct the whole work comprised in contract No. 4, of \$483,327 was accepted, and a contract was let in pursuance thereof. The pleading also sets forth that previous to this, contract No. 1 was let to the S. M. Jones Company for \$54,000—No. 1 being a contract for pumps and gas engines and other machinery for pumping station necessary to be erected in connection with said plant. It also sets forth—

and it appears to be true—that these eight contracts are subdivisions of only a part of the work required to be done in order to complete this proposed plan of extension, and we are informed by the engineers who testified—and it is undisputed—that it will require further subdivisions, numbering up to, perhaps, fourteen, to properly subdivide the work; that is to say, so it may be let systematically to persons engaged in different lines of work and furnishing different classes of materials.

The cross-petition contains averments as to the amount which will be required to complete the entire proposed additions to the water works system. Upon the trial it was conceded that to complete this system upon the basis of furnishing twenty million of gallons of water per day, would require an expenditure of at least \$650,000, and that to complete it as contemplated by these plans in such a way as that certain parts will be sufficient and suitable for a plant furnishing sixty millions of gallons of water per day and admitting of the plant being completed in all its parts up to that capacity, would require an expenditure of at least \$765,000. Now, this ordinance of May 8, 1905, appropriates for the purposes of this extension \$565,000 only.

I should mention, as a part of the history of this transaction, that Mr. Parmalee, a man apparently skilled and learned in such matters, and fully competent, was employed as consulting engineer upon this work, and that under his supervision and with the assistance of the city chief engineer, Mr. Consaul, certain general plans were prepared and the specifications for the different contracts were also prepared, and the same were adopted by the board of public service and approved by the state board of health, as required by law, and the bids were based upon these plans and specifications and such further details as were furnished by the respective bidders. It also appears that in pursuance of permission, duly and lawfully given, part of this contract No. 4 was sublet by the Norwood Engineering Company to A. Bentley & Son, who entered upon the work and expended perhaps \$1,200, besides incurring pecuniary obligations for material of a much larger sum, before suit was begun or any demand made to desist; but we dismiss

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this phase of the case with the remark that we do not think that all that was done was sufficient, in view of the large amount of expenditure involved, to justify the application of any rule of estoppel to prevent the relief prayed for, even if the principle of estoppel were applicable.

I should also mention that the good faith of the plaintiff in instituting this action was challenged, it being contended that he is not proceeding as a tax-payer and for the benefit of other tax-payers as well as himself, but that he represents Mr. Lightbody, who is one of the unsuccessful bidders and is neither a resident of Toledo nor a tax-payer thereof, and is simply trying to secure another opportunity to bid; that Mr. Lightbody is to pay all costs and expenses of the action. It appears that there was some misunderstanding upon this point between Mr. Yaryan and Mr. Lightbody. We have heard the evidence touching this matter. While Mr. Yaryan is under the impression and seems to have had it represented to him by some go-between, that the costs and expenses were to be taken care of by Mr. Lightbody, Mr. Lightbody denies that the parties so representing to Mr. Yaryan had authority from him to do so, but admits that he has contributed some money—\$50, I believe—towards paying the expenses of the suit, and denies that he is giving it financial backing beyond that. So we conclude to pay no heed to this claim of disqualification of the plaintiff, and will go to the merits of the controversy.

Now, as I have said, there are a large number—nineteen or twenty—specifications of alleged fatal irregularities in these proceedings, and all that the evidence tends to establish we resolve under four charges. Before going to this, I should say that there is not anywhere, in the petition or the cross-petition, any charge of fraud or bad faith upon the part of anybody in these proceedings. Neither does it appear from the evidence that there is any ground for such charges; it fairly appears that the parties interested, the representatives of the city and all concerned, proceeded with care, and with entire honesty of purpose.

The first of these charges is: that certain powers lodged in the council by law, were not exercised by it, but that the board

of public service, without authority of law, assumed to exercise such powers. That the council could not delegate these powers to the board of public service, because they were legislative in their nature, and any attempt that the council may have made to delegate such powers to the board of public service was nugatory. This is said of the making of the contract, and of the formulation of plans, *i. e.*, the drafts and specifications. I should say that this is the contention on behalf of the plaintiff. On behalf of the city, the city solicitor has advanced a somewhat different view, but leading to the same result. He seems to be of opinion that the question of the delegation of powers is not involved; that the powers exercised by the board of public service are not legislative, but administrative; but he does not agree with counsel for the plaintiff in the proposition that the only powers that the council may exercise are legislative powers; he contends that the council may exercise administrative powers as well as legislative powers, and that the making of this contract and preparing of these plans was among the administrative powers, or executive, if you please, of the council, and should be exercised by it. Counsel for the contractor contend and agree with the solicitor to this extent: that these are administrative powers; but they insist that the council may not exercise administrative powers, or if it may exercise any, that these are not among the administrative powers that the council may exercise.

The contention that legislative powers can not be delegated by a legislative body to another body that may not exercise legislative powers, may be disposed of by the single remark that that seems to be the undisputed law upon the subject; so that, if these are legislative powers, to be exercised by the council, and the council has undertaken to delegate these powers to the board of public service, which is not a legislative body under the code, of course such action would be nugatory. Now, certain sections of the statute are referred to upon this question, found in Vol. 96 of the Session Laws, which it is conceded contains the law in force applicable to this case, and which I shall use because it is much more convenient to handle, and sectional numbering herein is less compli-

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cated than in the Revised Statutes. The power of a municipality to enter upon this work is unquestioned, and is found in Subdivision 15 of Section 7, of what is commonly called the New Municipal Code; and the opening paragraph of that section provides that "All municipal corporations shall have the following general powers and council may provide by ordinance or resolution for the exercise and enforcement of the same." But this section does not throw much if any light upon the controverted point. Section 123 reads:

"The powers of the council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe of the city government except those of its own body, except as may be otherwise provided in this act. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."

It seems very clear from the reading of this new code that the Legislature started out with the general scheme and purpose of vesting all the legislative powers in the council, and of vesting no powers for its exercise but legislative powers. It does not appear to us that it carried out this plan with entire consistency, though it did so in a general way. It is undoubtedly competent for the Legislature to confer upon the council other powers than legislative powers, and prior to the adoption of this new code, as we know, the council exercised executive as well as legislative powers. Illustrations were given in several sections cited to us of deviations from this plan of confining the council to the exercise of legislative powers only. I shall not take time to refer to them, unless, perhaps to one instance, found in Section 51 of the statutes, where the subject of special assessments is being dealt with, and where it is provided that the council after resolving upon an improvement, "shall thereupon prepare or cause to be prepared plans and specifications, estimates and profiles of the proposed improvement, showing the grade of the same with reference to the property abutting

thereon, which plans, specifications and estimates and profiles shall be filed in the office of the department of public service," etc.

From that provision it is argued upon the one hand that this is a legislative power, because the Legislature had stated, in another part of the code, that the council shall exercise none but legislative power. On the other hand, it is argued that it is a deviation from the scheme of confining the council to the exercise of legislative power, and we think the latter is the proper view of the matter. We think that this matter of the *preparation* of plans, specifications, estimates and profiles, is not a legislative duty.

I go now to the sections upon the subject of the authority of the department of public service, the members of which are known as the board of public service. Section 138 provides:

"In every city there shall be a department of public service which shall be administered by three or five directors, and the number of said directors shall be fixed by ordinance or resolution of council. Such directors shall organize as a board to be known as the 'board of public service.' Directors of public service shall be elected for a term of two years and shall serve until their successors are elected and qualified. They shall be electors of the city. They shall make their own rules and all regulations for the administration of affairs under their supervision.

"Section 139. The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act."

Before reading Section 140 I should remark that it is contended by the city solicitor that the power of the department of public service over works, improvements, buildings, etc., is *supervisory*, and that it has no power to arrange, by contract or otherwise, for the *construction* of such work, especially such a work as this under consideration. Section 140 provides:

"The directors of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, sewers, drains, ditches, culverts, shape channels, streams and water courses; the lighting, sprinkling and

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cleaning of all public places, and the construction of all public improvements and public works, except as otherwise provided in this act."

Section 141 provides for their management of certain works. Now, our construction of this section, in connection with Section 143, which I shall read, is, that they have the power to contract for the construction, limited, of course, in a degree by the action of the council in the premises. Section 143 provides:

"The directors of public service may make any contract of purchase of supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars," etc.

It is conceded by the solicitor that they may do this, but he contends that where the expenditure exceeds five hundred dollars, the authority is not so extensive, that they may not make contracts for the purchase of supplies, etc. As to such contract this section further provides:

"When any expenditure within said department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

This contract, which the statutes say the board shall make, counsel for the city insists that the board may simply execute; that it performs the same function in the premises that the mayor did formerly, to-wit, the signing of contracts, thereby executing them; that the contract must be formulated and approved by the council, and, necessarily, by legislation of the council, for it is provided in the code that the council can act only through ordinance and resolution. But we think that is not the intention of this statute, for it is provided, further along in the same section, that:

"Whenever it becomes necessary in the opinion of the directors of the appropriate department in cities, or of the council in

villages, in the prosecution of any work or improvement under contract to make alterations or modifications in such contract, such alterations or modifications shall only be made by such directors in cities or council in villages, by resolution, but such resolution shall be of no effect until the price to be paid for the work and material, or both, under altered or modified contract, has been agreed upon in writing," etc.

It would be a very curious state of affairs if the Legislature had provided, and if this statute should require the construction, that the council in the first instance must make the contract, that the board of public service had no authority to enter into the contract, but that immediately or at any time after the council had made the contract, the board of public service at its will might alter the contract to suit itself. We think that is not the meaning of the statute, and we think the statute uses the terms "make" and "execute" in such manner as to fairly distinguish them and to indicate that the board of public service is to do both. Section 144 provides: "All contracts *made* by the directors of public service shall be *executed* by them in the name of the city," etc.

Notwithstanding the general and sweeping provisions found in Section 127 to the effect that "all powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein," which evidently gives executive or administrative authority to the council where it is not conferred upon some other body, we think the power in this instance is conferred upon the board of public service and may be exercised by it; so that in entering into this contract we think the proceedings are regular so far as the exercise of power was concerned; that it was properly done, by the proper board or tribunal; and as to the matter of plans and specifications, we think that is also executive or administrative and was performed by the proper officers. *Wayman v. Southard*, 10 Wheat. (U. S.), 1, 42; *State v. Messenger*, 63 O. S., 398; *Railroad v. Commissioners*, 1 O. S., 77; *State v. Commissioners*, 54 O. S., 333; *Territory, ex rel, v. Scott*, 3 Dak., 357.

The second general charge, which is quite comprehensive, is stated in various forms in the pleadings, and is in substance

that the requirements of law as to competitive bidding were not and could not be observed, because such plans as gave a common basis for bids, were not prepared and adopted.

There is no provision in the Municipal Code requiring plans and specifications to be prepared for bidders, or as a basis for bids upon work of this character. No doubt it is very proper practice—perhaps, in some instances, a necessary formality—we are not prepared to say it may be dispensed with in all cases; nor are we prepared to say that it is required in all cases. Certainly there is no statutory requirement for it. The theory and contention of council for plaintiff, and for the city, is that such plans and specifications are necessary, in the nature of things, whenever there must be competitive bidding so that there may be a common basis upon which the bids may be formulated and submitted; that all who undertake to bid should know precisely what they are to do or to furnish, and that without this provision and preparation there could be, in the nature of things, no competitive bidding. We are cited to a large number of authorities in support of this proposition, but, in all cases, so far as we have observed, the statute under consideration provided that the contract should be let to the “lowest bidder,” or to the “lowest responsible bidder,” or words of like import. And, as is said in *Packard v. Hayes*, 94 Maryland, 233, and many other cases, where the law under consideration required the letting to be done to the “lowest,” or the “lowest responsible bidder,” this must be done in order that the awarding body may be able to accomplish its function, which is simply to make a mathematical computation and ascertain which is the lowest bidder, or, if the lowest responsible bidder is required, to determine the responsibility of the party, and then enter upon such mathematical computation. The statute under consideration here—Section 143—provides that the board of public service shall make a written contract with the “lowest and best bidder,” and further provides that the board may reject any and all bids. We think this permits the board to take into consideration more than the price and more than the character of the bidder; we think it allows the consideration of three elements at least, and that the competition provided for in this statute

is in three lines, at least. The awarding tribunal may consider—

1st. The quality of the thing, the feasibility of the plan, the efficiency of the thing that is to be furnished, etc.

2d. The quality of the bidder, his qualifications, responsibility, etc.

3d. The price, in view of the other considerations.

So that in determining which is the “lowest and best” bidder, the board in its discretion determines, substantially, which is the best proposition, all things considered. This is a wide departure from the law requiring the letting to the lowest bidder; and it would be interesting to trace the history of the changes in the laws of Ohio upon that subject and the holdings thereunder, though perhaps not profitable now, and we state our conclusions only. It may be said that the law thus construed opens the way for what is commonly called “graft,” or the perpetration of frauds upon the municipality; for the exercise of favoritism which would be inimical to the interests of the people; but we are bound to say that it seems to us that there are as great opportunities for these methods of fraud under the old system, which required the letting to the lowest bidder, as there can be under a system which allows municipal bodies in considering bids to take advantage for its benefit of everything, that a private person might take advantage of that would be for his benefit. It permits the public to get the best and (though it may not be the lowest in price) it may be the cheapest in the long run. It does not require it to accept the lowest price even though based upon plans, workmanship or materials of inferior kind and quality. That being true, it follows, we think, that the plans and specifications required in order that the bidding may be competitive, need not go into the details that would be required if there were nothing left for the awarding body to do but to make a computation. It is not necessary, in other words, for the bidders to compete or bid upon precisely the same thing as in cases where price alone is to govern the award.

These general plans that I have mentioned—I need not undertake to describe them—were approved by the council, approved by the State Board of Public Health and approved by the board of public service. But these plans were

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not all that was furnished to the bidders; in addition to the plans for the work and materials to be furnished and performed under each of the several contracts, running from one to eight, specifications were prepared which were published in pamphlet form, together with the advertisement, proposal and contract, and these specifications seem to us to set forth with great particularity what was required of the bidders. This contract No. 4, for instance, was divided into some forty-four separate items, and those items were subdivided in many cases. The specifications seem to enter into the details with very great particularity. Mr. Consaul was called as a witness, and he says, as to certain of these items, running from No. 29 to No. 37, inclusive, that there are no plans furnished, that is to say, no drafts, or sketches, but he does not say that there are no specifications. It appears that as to these items there are no special plans, using the word "plans" in the sense of sketches—but the things are provided for by the specifications; and Mr. Parmalee, testifying on behalf of the defendant, says that, that the general plans, taken in connection with the specifications, are so clear and specific that any person competent to do that work, or to supervise the doing of the work, might understand readily what was required under this proposal. As to certain details, the board of public service required the bidders to furnish their own sketches or plans.

It also appears from the evidence that the parts not detailed, but only described in the specifications—being the parts for which bidders were to furnish detailed plans—were well described in the specifications so that persons competent to bid knew exactly what was required, and that the parts and things actually bid upon by the various persons were intended to perform exactly the same work and differed only in appearance. In other words the specifications permitted the use of well known standard apparatus kept in stock or manufactured by different concerns in the United States. It seems to us that this method broadened the field of competition and that to have adopted any particular part or thing would have tended to suppress competition. It appears in evidence that in the United States there are about nine institutions that are capable of constructing works of this character. Of those nine, seven bid

upon this work. That would indicate that there was competition and it does not appear to us from the testimony of any witness, or otherwise, that the bidders found any difficulty in ascertaining what they were to bid upon or that prices were excessive; and in making their bids they took the matter up, as they were required to do by the method of submission, and bid upon the items item by item; and assuming that definite plans were required, it is said:

“The test to be applied in determining the meaning of plans and specifications in connection with public bidding is the meaning derived therefrom by bidders and contractors familiar with the language employed” (*State v. Abbot*, 2 C. C.—N. S., 281).

And we think that is a fair rule for testing the matter. If it were submitted to a person unskilled in such matters, he would probably be unable to ascertain from these plans and specifications what is required. But the undisputed testimony is, that persons competent to furnish these materials and to do this work, or to oversee it, could readily understand what was required of them by these plans and specifications. As I have said, the plans admit of some deviation in the form of construction and in the class of materials to be furnished, but that, we think, is admissible under the provision that the lowest and best bidder is to be awarded the contract. That, we think, is necessary. There are many reasons why this should be so, which I shall not discuss now for the reason that, following this opinion, Judge Wildman will deliver an opinion in a case (*Holbrook v. City, post*), that involves this question of the scope of discretion, variation from any definite plan, etc., that may be allowed under the provision that the lowest and best bidder shall be awarded the contract. I expect him to discuss the matter fully, and, therefore, I shall say no more about it except to refer to the case of *Ampt v. Cincinnati*, 17 Cir. Ct. Rep., 516; s. c. 6 N. P., 208, a case which was affirmed by the Supreme Court, where there is a discussion of the subject that we think quite pertinent to certain phases of the case at bar; and also to the case of *Ohio, ex rel Bryce Furnace Co., v. Board of Education*, in the 14th Cir.

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Ct. Rep., p. 15, opinion by Judge King formerly of this court, where there is some discussion of the matter. See also *State v. St. Bernard*, 10 Cir. Ct. Rep., 74; *Coppin v. Herman*, 6 N. P., 452; 7 N. P., 529, affirmed 63 O. S., 440.

The system that the board of public service evidently contemplated adopting ultimately, unless bids should develop that it would be more expedient to adopt another, was the American system; but to get all the light and advantage that might be gained thereby, bids were invited on all other systems. It has been suggested that some of the plans and specifications adopted by the board of public service were sufficiently definite for competitive bidding on the American system, but they were not so for other systems; but since the proceedings respecting such other systems were of a merely experimental character, and no bids thereon were made, we do not regard this alleged incompleteness of plans as at all material. All that has been said and done respecting other systems may properly be regarded as surplusage or a work of supererogation.

There is one more very important consideration urged upon our attention, and that is, that if the city should enter into details, reducing everything to the last analysis, providing exactly how everything should be done, it could not avail itself of the guaranty of efficiency—in other words, some lee-way must be allowed to the contractor furnishing a work of this character, who is required to guarantee the efficiency of the plant—his guaranty would be all but worthless and nugatory if the plans were the plans of the city down to the very lowest detail, instead of being somewhat his own plans, and the authorities cited to support that proposition.

McKnight Stone Co. v. Mayor, 160 N. Y., 72; *Filbert v. Philadelphia*, 181 Pa. St., 530; *McRitchie v. Lake View*, 30 Ill. App., 393.

When the construction consists of the mere assembling and putting in place of parts of standard machinery, or the ordinary construction of edifices or works made of brick and mortar, wood, cement, and the like, the making of complete plans may be expedient and legally necessary; but we are not prepared to

say that it is either required by the law or expedient where, in a case like this, much depends upon adjustment of means to ends in the perfection of the system so as to make it work well, and where efficiency is the great desideratum, and where an enforceable guaranty thereof may be essential to save the city from fruitless expense of great magnitude.

The third objection urged is, that there is a non-compliance with Section 794 of the Revised Statutes, a section applying to boards and tribunals generally that have the awarding of public contracts, and which is retained by Section 143 of the Municipal Code and made applicable to municipal contracts, to-wit: "The provisions of Section 794 of the Revised Statutes of Ohio, so far as the same may apply, shall remain in full force and effect."

The proposal was submitted in such a way as to require the separate bids provided for by Section 794, and separate bids were received, but we are unable to find, and counsel for the plaintiff and the city failed to point out to us an aggregation of separate bids covering the whole work to be performed and the whole of the materials to be furnished, *i. e.*, covering the whole contract—that is less in amount than the bid of the Norwood Engineering Company. It devolves upon the parties complaining here to show that such bids were submitted and in such form that the board not only might waive defects and technicalities and accept the same, but that the board was required to accept them. And, furthermore, the element of "best bid," as well as that of "lowest bid" enters into this matter by virtue of Section 143, and in so far as Section 143 is inconsistent with Section 794, we have no doubt but Section 143 controls, and that it devolves upon the parties complaining to not only show that this aggregation of bids would amount to the lowest in price, but that in other respects it was the best bid. Waiving that point, however, we say that considering only the question of lowness of price, we fail to discover any aggregation of bids that would meet that requirement. Our attention is called to the bid of Mr. Burgard upon certain items taken in connection with the bid of the Norwood Engi-

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neering Company upon certain other items, but that is not permissible, for the reason that the Norwood Engineering Company put in its bid as a whole—a thing it had a perfect right to do—and it can not be required to construct a part at a certain price where it has conditioned its bids upon certain items upon the acceptance of the whole bid.

The fourth objection urged is, that there is an abuse of power because but \$565,000 has been appropriated, and the council has limited the expenditure for completion of the whole system planned to that amount. And in this connection it is argued that the council was bound, under the circumstances, to place a limitation upon the amount to be expended in completing the whole system planned. We are cited to no law in support of this contention that the council was bound to thus fix the limitation, and we do not know of any. We do not know why the council may not plan a public improvement that may or will require the expenditure of more money than it has on hand to appropriate for the purpose, and why it may not for the carrying forward of a public improvement from time to time as it is able appropriate moneys for that purpose, the contracts, of course, at no time to exceed—and they would not be valid if they did exceed—the amount appropriated for them, and that is certified by the auditor to be on hand when required. We mentioned during the argument by way of illustration, and we still think it a fair one, the matter of the planning of the boulevards for the city of Toledo. We understand that such a system is planned to encircle the city, or a part of it. We do not know why the city may not plan such a thing; why it may not provide all the plans and specifications and details for it; why it may not declare its purpose to build it, to condemn the necessary real estate and to improve it by grading, paving, setting out trees, etc., although it may not have on hand at the time the money to do this work, and why it may not then from time to time as it has the funds with which to proceed, carry forward the work, taking up, for instance, a mile this year and two miles the next, or why it may not proceed in the same way with respect to a public building, or why it may not proceed in the same way in respect to just such an improvement

as this; and we know of nothing which would afford a better illustration than water works for the city. For instance, if this city were totally without water works, might it not say "We will plan for water works for this city for its present needs and for its probable future needs," and, thereupon devise plans which would be sufficient for a city of three or four hundred thousand inhabitants, and complete plans and specifications therefor, declare its purpose to build it, and then appropriate such money as might be available for the completion of such parts of the system as it might think best to first complete. This, we think, is within the power and the discretion of the council. Of course, such plans might be defeated by the subsequent action of the council or by another council, because one council can not bind its successors, and the whole plan might be overturned in so far as its overturning would not interfere with contracts lawfully entered into or other vested rights.

But did the council as a matter of fact in this case limit the expenditure to \$565,000? That depends upon the construction of this ordinance of May 8, 1905. To determine the actual limitation we must look to the legislation in the light of commonly known surroundings and circumstances touching the subject-matter. All evidence of what was said in council by the different members and by the city solicitor was excluded—that is to say, there was an offer to prove it but we did not admit it, because upon this matter the council was acting as a legislative body and we thought it would be no more proper than the admission of like matters pertaining to like action by the State Legislature. This report of the engineering commission was shown upon the trial to have been in the hands of all the councilmen and laid upon their desks and examined by them, at least, before the passage of this ordinance of May 8, 1905. We received that testimony under objection and announced that we would rule upon it later. We conclude now that it ought to have been excluded; we think that should stand upon the same footing as the debates and oral representations in the council. It will be excluded, and an exception for the Norwood Engineering Company and of A. Bentley & Son will be noted.

The circumstance of the time required to finish up the work provided for by contract No. 4; we think must be presumed to have been known to the council, and it is made apparent by the evidence that a part of this work would require substantially two years in its performance. As I have stated, it was conceded upon the hearing that the whole work planned under the plans approved by the council would cost not less than \$765,000, and this we think it may be fairly assumed was known to the council. We do not think we have any right to assume that the council was composed of a lot of ignoramuses or of men who would not make any investigation of the matter upon which they were legislating. There was some testimony tending to show that upon the basis of these alleged lowest bids, that is to say, the aggregation of separate bids upon various items, the extension might have been finished to a capacity of twenty million gallons per day within the limit of \$565,000, but we are unable to find bids as thus claimed. But the council does not appear to have planned or resolved upon anything of that kind; it planned for a system some parts of which were adequate for taking care of sixty millions of gallons per day. As to a part of the system, only so much as would take care of twenty millions of gallons per day was to be constructed at once, and we must assume that the council in fixing that limitation or in the adopting of this legislation, had under consideration the plans which they had approved, the projects which they were forwarding, and not something which might have been done contrary thereto, and, therefore, we think that they should be held to have considered, adopted, promoted and intended the construction of a plant which they knew, and which everybody looking into the matter must have known, would cost more than \$565,000, and their legislation upon the subject should be read in the light of that important fact.

But we think that without this side light—without this aid—taking the legislation as it reads it does not place a restriction of \$565,000 upon the cost of the whole finished extension. Perhaps that is enough to be said upon this subject, but I will call attention to a few paragraphs of the ordinance that bring us to this conclusion. The council unquestionably authorized the construction of the whole extension planned. I have already

read the title of the ordinance. The limitation of \$565,000, we think, was placed upon the contracts that the board of public service was authorized by the council to enter into in the carrying forward of the enterprise. A reading and study of the ordinance brings us to the conclusion that what the council provided in the way of limitation is that which was required by law, to-wit, that the board of public service should not enter into contracts exceeding in amount for their payment the sum of \$565,000 appropriated. It must be conceded by all that nowhere does it state in the course of any of this legislation, that the whole cost of the entire improvement planned shall not exceed \$565,000. And we think that in construing this legislation, we should not only give the council credit for intelligence, but with the purpose of not doing an idle and foolish thing, and with purposing to accomplish that which they declared they desired to accomplish.

Now in this ordinance "Declaring the necessity for extending, enlarging and improving the present water works system of the city of Toledo and equipping and furnishing such extension and to secure a more complete enjoyment of the same by supplying pure and clear water to the city and the inhabitants thereof and authorizing a contract for the construction of certain parts thereof," the clause which has provoked the most discussion and which both sides rely upon as establishing their respective contentions is this:

"The board of public service may advertise for bids and let contracts for such part or parts of said water works extension at such times and in such order as to said board shall be deemed for the best interest of the city in securing a first-class, good and economical construction, provided that contracts shall not be let for said water works extension, which in the aggregate amounts to more than five hundred and sixty-five thousand dollars, which sum is now available in the treasury and which is hereby appropriated to meet such cost and expense from the money heretofore realized from the sale of bonds for the purpose and from the funds heretofore received as charges for water in the department of public service."

It will be noticed that the word "contracts" is in the plural. This section very clearly contemplates that this work is to go forward, not under a single contract, necessarily, but under

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contracts. We have observed how it was divided up into contracts. This seems to have been a systematic and philosophical mode of division, the best thing for all concerned to accomplish the purpose in the best way. The council, evidently, had something of that sort in mind; evidently knew that the whole could not be constructed during a year and perhaps not during two years; that \$565,000 would be sufficient with which to go forward with so much of the construction as could be accomplished within a year or two years. Therefore, they provided for that much, they appropriated that much and declared, as we read the ordinance, that the aggregate amount of the contracts to be let in the carrying forward of this enterprise was not to exceed \$565,000. It is not claimed here that contracts were let in excess of \$565,000. The theory of the parties undertaking to defeat the carrying out of the contract is that because it will require more than \$565,000 to finish the proposed extension upon the basis of the price at which the contract with the Norwood Engineering Company has been let, therefore that contract is invalid and nugatory, even though no appropriation had been exceeded in the making of it; that to use so large a proportion of this fund in the accomplishing of a part of the work when the remainder of the fund would not be sufficient to finish the work, is such an abuse of corporate power that it must have been known and should have been known to the contracting party—the party contracting with the city—and that that party is affected by it. Well, this may be a correct theory. We are not required to say. We are cited to authorities some of which seem to sustain the idea and some of which seem to us not to sustain it, but we decide this case upon the conclusion that I have already stated—that the ordinance does not attempt to limit to \$565,000 the cost of the construction of the entire improvement contemplated.

It is argued that the third paragraph of the second section of the ordinance of May 8, 1905, providing that certain payments shall not be made until satisfactory tests of the plan or system or plant shall have been made, evinces a purpose to have the whole extension planned constructed and completed at one time.

Undoubtedly it was the purpose to have all the extension that was planned constructed with all convenient speed, to the end

that the pure water supply sought might be available to the people of the city. But it is apparent that this could not be well done in less than two or three years, before the expiration of which time other funds might be made available to do the work that would necessarily and properly be postponed until it would become useful. Whether a contractor for a part to be constructed the first year must wait for his pay, or a part of his pay, until the finishing of the plant a year or two years later, may well be doubted. If his part of the work could be tested before the completion of the whole extension it would certainly be imposing upon him a great hardship without adequate cause, to make such requirement. We think that was not contemplated. There is nothing in the evidence to warrant the inference or conclusion that perfect and satisfactory tests of parts could not be made until the completion of the whole. But even if this waiting for the final payment, or part payment, until the completing and testing of the whole was contemplated and is provided for, that does not, in our opinion, weaken the argument in support of the contention that for the construction of the parts that would be constructed last, the providing of other funds was contemplated.

This disposes of all the points as I now recall them, that are urged against this contract. It appears to us that the steps have been regular and orderly, and we are glad to know and are glad to be able to say that it is not claimed or shown on behalf of anybody that there has been any fraud or overreaching or moral wrong in any way; or that the contract price is excessive or unreasonable, but that what is depended upon here to defeat this contract is simply informalities or irregularities in the steps pursued. We find none that should defeat the contract.

The judgment of the court is that the petition and cross-petition shall be dismissed and the costs go against the plaintiffs and the city.

L. W. Morgan and A. T. Courley, for the plaintiff.

C. S. Northup, for the City of Toledo.

Marshall & Fraser, Smith & Baker and U. G. Denman, for the defendants.

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**PATENTED MATERIAL FOR STREET IMPROVEMENT AND
COMPETITIVE BIDDING.**

[Circuit Court of Lucas County.]

**WILLIAM L. HOLBROOK, A TAX-PAYER, ETC., v. THE CITY OF
TOLEDO ET AL.**

Decided, March 31, 1906.

*Streets—Improvement of, with Patented Material—Not a Restriction
on Competitive Bidding—Purpose of the Law as to Competitive
Bidding—Municipal Corporations—Public Policy—Specifications
Calling for Monopolized Material—Discretion in Selection of Ma-
terial.*

Competitive bidding is not necessarily narrowed, but may be broad-
ened, by admission to the competition of material which is monop-
olized by reason of patents; and in the exercise of a sound dis-
cretion, it is competent for the proper city authorities, in adver-
tising for bids for a street improvement, to call for material which
is covered, or the assembling of which is covered, by patents.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

This is a case calling, perhaps, for the application of some
of the principles which have been announced in the case of
Yaryan v. City of Toledo (*ante*), just decided by this court.
The case before us, however, involves the additional and inter-
esting question as to whether the city, in calling for bids for
a street improvement—in this case a pavement—may advertise
for and accept a construction, the materials entering into which
or the methods and proportions of assembling which, are cov-
ered by letters patent.

The petition in this case, while in no way alleging or suggest-
ing any corrupt intent on the part of either the city officials
or the contractor to whom the contract has been let—the defend-
ant Streicher—contends that the letting of the bid and the
making of the contract are an infraction of the spirit of the
law which provides for competitive bidding.

It is urged that to permit a proffer of an improvement the
right to make which and dispose of it to the city inheres in

some individual or company, deprives all other persons of an opportunity for legitimate competition and deprives the city of the benefit of such competition. The case is before us on appeal and was submitted upon a demurrer to this petition, the demurrer alleging that the petition fails to set forth facts stating a cause of action. After the formal averments of the petition, which I need not read, and in which proceedings are alleged for the improvement of Spielbusch avenue, in this city, and Cherry street market place, it is alleged that the bid of one Henry Streicher was accepted and an agreement entered into therefor; that said agreement is void "and involves a misapplication of the funds of said city and an abuse of its corporate powers" for the reason that the specifications for the construction of said improvement call for Warren's bitulithic pavement exclusively, and that certain elements entering into said pavement are covered by letters patent issued by the United States government to the Warren Brothers Company, a corporation; "that the machinery and appliances for laying said pavement, and the process of mixing the material used in said pavement are also covered by letters patent issued by the United States government; that all of these patents are owned exclusively by said Warren Brothers Company, and by reason thereof no person can make use of any of the machinery, appliances, methods or material so covered by said letters patent save and except upon the consent of said Warren Brothers Company to such use upon such terms as the said Warren Brothers Company may see fit to exact, by reason whereof there could not be and was not such competitive bidding for the improvement of said avenue and market place as is contemplated by the laws of the state of Ohio; that the city of Toledo had not, before said bids were received or before said agreement was executed, acquired the right to secure, at a reasonable cost, the right of said patents or any of them, with respect to said improvement, for any successful bidder for the work, and the bidders were not placed by said city, in that respect, on substantially equal terms; that while the said notice to contractors called for bids on various kinds of pavement, the said board of public service expressly reserved the right to reject any and all bids for such kinds of

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pavement as were open to equal and fair competition and accept the bid of said Henry Streicher for the only kind of pavement which was controlled exclusively by said Warren Brothers Company and permitted no competition."

Again it is alleged "that said specifications called for the use of a patented and monopolized material and process, owned and controlled exclusively by Warren Brothers Company, which tended to stifle competition among bidders on said improvement and to prevent the letting of said contract to the lowest and best bidder as required by the laws of this state."

Upon the basis of these and some other alleged facts incidental thereto, the plaintiff prays for an injunction to restrain the defendants and each of them (the defendants named other than said city and said Streicher being members of the board of public service of the city of Toledo) "from taking any steps or performing any act under the terms of the agreement hereinabove set forth, and enjoining the said Henry P. Streicher from commencing or doing any work whatever upon said Spielbusch avenue and Cherry street market space, under said agreement" and further praying "that upon final hearing the said agreement for said improvement may be declared to be null and void and the defendants and each of them perpetually enjoined from performing or attempting to perform the same; and for such other relief as may be proper and equitable in the premises."

The question primarily involved is almost a novel one in Ohio. It has not been expressly passed upon in any adjudication which has been called to our attention, or which by considerable research we have been able to find. It has been made a matter of dictum in three cases at least in the state, but in no one of these cases does the question seem to have been discussed or is it expressly decided. The case of *Hastings v. Columbus*, 42 Ohio St., 585, does not decide it. There the city, prior to the advertising for bids, had acquired the right to the use of a patent, and the Supreme Court was not called upon to determine what would have been the effect of an attempt to construct such a pavement after the advertising for bids and the letting of a contract without having previously acquired such right, and the point decided by the court which bears even incidentally

upon the question at bar, is made the subject of but brief mention and without any special discussion of the principle. The language on the subject is found in a paragraph on page 595. I will not read it.

In a case in the 21st Circuit Court Reports, *Polhamus v. Board of Education*, page 257, Judge Laubie furnishes us with a dictum indicating his opinion that a city would not have a right to accept a contract for a patented improvement. But in so expressing his individual opinion he uses phraseology almost conveying the impression that had the question been one involved in the case, the decision would have been adverse to the opinion expressed by him, by reason of lack of accord with his views entertained by the other members of the court. This fact is not so clearly indicated by him, however, that it is well to place much emphasis upon it.

In a case decided by our own court, *Ohio, ex rel Bryce, v. Board of Education of the City of Toledo*, 7 C. D., 338, we have a somewhat emphatic expression by Judge King of his judgment that our law does not prohibit the advertising for the use of a patented invention for the heating and ventilating of public structures. While, as in these other cases, the question here was not directly involved, I may delay for a moment to invite attention to some of his language, merely because it is the language of a former judge of our own court. The proceeding was one for mandamus, brought by the Bryce Furnace Co. to compel the letting of a contract to that company. The city had accepted a bid made by the Smead Furnace & Foundry Co., and was about to award a contract to that company, but the Bryce Furnace Company claimed that it was the lowest and best bidder and was insisting that the contract should be let to it. On page 341, Judge King says:

“The apparatus is known in these contracts, and in the exhibits as ‘the Bryce heating and ventilating apparatus.’ And it says (speaking of the petition) that the heating and ventilating system provided for in the contract is the fan blast system, which provides for ‘heating the following rooms with warm air’ (and describes all the rooms in the building, including the basement). A perusal of that is sufficient to indicate that this is a system of which this corporation owns the right,

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although nothing is said about patents. It is a system which it proposes to put into the building for heating and ventilating those various rooms. And from the description given in the bid of the Smead Company, and from the allegations of the petition, it is plain enough that it is also a system which it devises and of which it is the proprietor."

On page 342, the judge says:

"We have had occasion before to say in matters of this kind, and further reflection only strengthens our opinion upon it, that this suit has not yet been so framed as that the discretion which the law has given to these boards can be controlled, either by writ of mandamus or by an injunction, when it comes to the question of selecting an apparatus that is in the control of a single individual or a single company or firm."

On page 343 he says:

"But after all, the board is not required to finally adopt a system whose owner has bid a lower sum for putting into a public building than the owner of some other system. It can leave the question of determining finally what system it will adopt for consideration after all the bids are in. The question of price, manifestly, might have some influence with the board of education in determining which one it would accept, if all of them, or two or three of them are substantially equal in merit, but it would not be binding on the board to accept one because it was the lowest bid, although they might consider it. It still has the right which the law has given it, to reserve the determination of the particular system it will adopt until after the bids are opened, especially where those systems are largely covered by patents; and we fail to see any way in which the law controls that discretion in the board of education. * * * But for these things controlled by patents the market is not free and open. It is controlled by a single owner. We know of no way which the law can regulate that. We do not believe that you can control the discretion of the board of education to adopt the system after the bids are in, nor do we think it would be wise to do it. So long as it is the privilege of the inventor to secure from the United States government the right to his own inventions, and so long as the law protects him in that right, we see no object in saying that because some other person has a different patent, the owner of which bids a lower sum than the owner of this one, the discretion of the board to adopt one or the other should be controlled nor do we think it can be."

I hardly know what the judge meant by this last phrase, or some of these last phrases, unless he had it in mind that the exclusive right to make and vend an article with regard to which the United States government has issued patents and which right is protected by the United States law, may not be the subject of restriction even by a legislative enactment of a state. Something along this line is quite earnestly urged in the extensive pamphlet brief which was submitted by one counsel as a part of his argument in the present case, made by Edwin L. Harpham, counsel for the city of Evanston in a case pending at the time of this brief in the Supreme Court of Illinois. I am not much disposed myself to accept, without a good deal of consideration, the position that the state might not restrict the use of a patent right by a municipality in the state of Ohio; the question before us does not necessarily involve it; the question is, rather, as to whether in the course of the powers conferred upon the municipality by the Legislature, we find any expressed or implied qualification as to the use of those powers in the selection of material or in the manner of construction of an improvement which a municipality is authorized to make. The power of the city to pave streets is broadly given by the statute and in it there is set forth no express qualification of that right limiting the exercise of the power to the adoption of such means as are not exclusively controlled by individuals or concerns. So that we are driven to examine this question in the light of such adjudications as we can find and such principles as we may be disposed to adopt, to determine whether or not the principle of public policy invalidates the action of a city council in not confining its choice to articles which are open to general use and not controlled exclusively by patentees or otherwise.

The sole question is: Is the restriction which is contended for by counsel for the plaintiff to be implied from the law applicable to this case? As I have already intimated, no bad faith is alleged in the petition, or even hinted at, but it may be proper to inquire whether the purpose of the law which makes provision for competitive bidding for such contracts, is destroyed by the advertising for or the acceptance of such a contract as

the one let to the defendant, Streicher, in this proceeding. The object of the law probably is two-fold—I refer to the law making provision for competitive bidding. It is, on the one hand to enable the public to obtain that which by reason of its price and quality is the most desirable for it as an investment, precisely as an individual in buying an article will take into consideration both the price and the quality; and the other object of the law is to prevent as far as it may, improvidence and corruption on the part of municipal authorities; and it is fair to inquire as to what is the effect of permitting a board of public service in making its choice to take into account articles which are the subject of exclusive use by one or more individuals, as bearing upon these two objects of the law.

I shall discuss a little more fully not only the object, but what in my judgment is the result of such restriction as is here contended for. But, before reaching that, it is well to say that while in our own state no rule upon the subject has been expressly established, in either the court of last resort or any of the lower courts, so far as we have been able to find, there have been numerous adjudications, many of them entitled to the highest respect, in the courts of other states. As stated by counsel on behalf of the city in oral argument, the controversy seems to have been started in two early cases, in Michigan and in Wisconsin—the one in Wisconsin being decided a little earlier than the other, and in each of those cases there was a division of opinion on the part of the judges who rendered the decision. So far as time would permit, we have made examination of the numerous cases cited—not quite so critically, perhaps, as we should have been glad to do in all instances—but we have not felt altogether compelled to go through the reasoning of all of the judges in the decisions of the various states, because of the conceded fact that there is an irreconcilable conflict of authority between and among them. In the brief of counsel in the case of *Prindle v. City of Evanston*, the case to which I have already referred, I find them summarized in a manner which, so far as my investigation goes, seems to be justified. I have examined a number of cases with a view to ascertaining whether he was

correct in his conclusions as to the result of adjudications in the several states. On page 28 of this brief he says:

“The Wisconsin view, as expressed in *Dean v. Charlton*, 23 Wis., 590, was that where the statute requires the contract to be let to the lowest responsible bidder, such statute applies to patented articles, and no competition is possible. That view, however, has been materially modified by a later decision (*Kilvington v. Superior*, 83 Wis., 222).

“The Michigan view is that where the statute requires the contract to be let to the lowest responsible bidder, such statute applies to patented articles and all the competition possible is required.

“The New York, Pennsylvania, New Jersey, California and Tennessee view is that where the statute requires the contract to be let to the lowest responsible bidder, such statute has no application to the case of patented articles; that such statute was intended to regulate the exercise of and not to limit the power to purchase what was desired.

“The Missouri view is that where the statute requires the contract to be let to the lowest responsible bidder, such statute does not prevent the use of a patented article where it appears from the testimony that no other article is equally as good.

“The federal court view is that the courts have no right to review the discretion of the municipality in the selection of paving materials, even if such materials are patented.”

A large number of cases might be cited, and I have been tempted to incorporate them into this opinion for such reference as it might be worth while to make of them later; but I will not encumber it with further citations of these numerous decisions, because, after all, in our own state it becomes a question of principle and a matter of reasoning to determine what rule should be adopted in view of our statute. It may be said in passing that in many of these decisions of other states, indeed in the most of them that I have had occasion to examine, the phraseology used in the statutes is not that the contract must be let or may be let to the lowest *and best* bidder, but it must be let either to the lowest bidder, or, in most cases perhaps, to the lowest responsible bidder. Probably in all cases where the statute provides that it shall be let to the lowest bidder it contemplates responsibility as essential before the letting of the contract. It is contended by counsel for the plaintiff that

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the assertion made that the early Wisconsin view expressed in *Dean v. Charlton*, *supra*, had been modified by a later decision in the case of *Kilvington v. Superior*, 83 Wis., 222, was a contention which could not be sustained in view of a typewritten transcript of a still later opinion decided by the Supreme Court of Wisconsin and which typewritten opinion has been handed up as a part of the argument of counsel for the plaintiff. This late case to which I have made reference is that of *Clarence J. Allen v. The City of Milwaukee et al.* It may not be very important to follow to its ultimate length the inquiry as to how the Supreme Court of Wisconsin has finally determined this question, but it is interesting, in view of the fact that the Supreme Court of Michigan has steadfastly adhered to the opinion announced by Judge Cooley in the early case to which reference has already been made, *Hobart v. Detroit*, 17 Mich., 245. On page 227 of the 83 Wis., I find this comment upon the *Dean v. Charlton* case, *supra*, and some other adjudications subsequently had in the state of Wisconsin, touching this question. I read:

“Upon the authority of *Dean v. Charlton*, 23 Wis., 590, it is contended that, as the mode of building the crematory was a patented one, the contract was void, on the ground that there could not be fair competition in bidding for the work, which by the charter was required to be let to the lowest bidder (Section 921, Revised Statutes). The case of *Dean v. Charlton* was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The Legislature subsequently validated the assessments so held void in that case, and in *Mills v. Carlton*, 29 Wis., 400, and *Dean v. Borchsenius*, 30 Wis., 236, the validity of this legislation was sustained. Since that time the direct question involved in that case, which was in respect to assessments against abutting lots for paving the street, has not been before the court; but in *Dean v. Charlton* the majority of the court, after commenting upon the case of *Harlem Gas Co. v. Mayor*, 33 N. Y., 309, expressly disclaimed deciding whether the city might not have contracted for laying such pavement at *its own* expense, under its general municipal powers, which is really the question here presented. In view of the legislation which followed *Dean v. Charlton*, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods

and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. Detroit*, 17 Mich., 246, and *Motz v. Detroit*, 18 Mich., 515, decided at about the same time, a contrary conclusion was reached; and in *Nicholson Pavement Co. v. Painter*, 35 Cal., 699, and *Burgess v. Jefferson*, 21 La. Ann., 143, the rule of the majority of the court in *Dean v. Charlton* was sustained. Since then, in *In re Dugro*, 50 N. Y., 513, the question has been decided in conformity with *Hobart v. Detroit*, *supra*, and other like cases; and in *Yarnold v. Lawrence*, 15 Kan., 129, 131, Brewer, J., notices the diversity of judicial opinion on the question and is inclined to favor the views of the courts of Michigan and New York (*Baird v. Mayor*, 96 N. Y., 567)."

There can be no escape from the conclusion that the judge who used that phraseology is himself doubtful of the correctness of the principle enunciated in the earlier case of *Dean v. Charlton*, and he expressly says, speaking for the whole court, that they are not disposed to extend the rule in that case beyond the particular point there decided. In the recent case decided by the Wisconsin Supreme Court, which, by the way, pertains to a bitulithic pavement, we are informed that subsequent to the *Dean v. Charlton* case the Legislature of the state had made special provisions as to how and when patented improvements might or might not be used. It became a matter of special legislative enactment, so that possibly it was not important for the Supreme Court in either of the cases, the one in the 83d Wis., or *Allen v. Milwaukee*, *supra*, to decide the precise question which is involved in the case now under consideration. It is enough to say that there has been a weakening in the judicial opinion in Wisconsin as to the impotency of a municipality to avail itself of a patented improvement irrespective of statutory enactments expressly referring thereto. It may be remarked that the Wisconsin rule as it started was based upon a statute which provided that a contract should be let to the lowest responsible bidder, and I shall have occasion to refer a little later to the power which is given the board of public service in Ohio in the construction of a like improvement, to let it to the lowest and best bidder, as bearing upon the question

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whether a little more liberality is not given, or a little wider scope, to the exercise of authority by the board of public service in Ohio than was given to the municipal authorities in Wisconsin under the statute to which I have referred. We have in Ohio numerous adjudications drawing distinctions between governmental and what may be called proprietary or business powers of municipal corporations. This matter seems to relate more largely to the exercise of business powers—such powers as an individual might exercise in his own behalf—in the protection of private interests, and at the outset the query naturally arises, if an individual may buy that kind of a thing which suits his taste, which is best adapted to his needs and requirements, irrespective of the question whether it is or is not patented, why can not one hundred thousand, or two hundred thousand individuals who have joined in a great common project do the same thing? If one may do it, why may not many? To be sure there is no restriction upon the exercise of all sorts of powers by an individual, where restrictions may be called for to prevent improvidence or corruption on the part of trustees of a municipal society; but after all, if it is a benefit—and it surely is oftentimes—for an individual to obtain an article which is protected by letters patent, even if he has to pay a higher price for it, so it is surely a benefit to an aggregation of individuals sometimes to do the same thing. In the case of *Field v. Barber Asphalt Paving Co.*, 117 Fed. Rep., 925, it is held:

“Where a contract for the paving of a street with asphalt limited the kind of asphalt to be used to Trinidad asphalt, such fact, and the further fact that such asphalt was controlled by a single corporation, did not affect the validity of the contract.”

And in the determination of the question, the federal judge announcing the opinion for the court, on page 929 of the report, says:

“An individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monopoly. And why

should not the same holding be made as to a city? Can it be so that because the city concludes, although wrongly, that Trinidad is the best asphalt, that its contract must be canceled on a showing that the Trinidad is not the best, and that it is the subject of a monopoly?"

In other words, it is not for the court to say which is the best. Our Supreme Court has expressly held that as to these discretionary powers which are given, it is for the body to which the discretion is given and not for a judicial tribunal, which passes upon the procedure, to determine which is best. It is not for this court, in other words, to exercise the discretion as to the choice of a pavement, and unless in the exercise of the powers given to the municipal corporation or the board clothed with the power and acting for the municipality, such body has departed from the law or has exceeded the powers to it given, this court has no right to interfere. Now it may be said when we are considering this question as to whether free, fair and wise competition is interfered with by permitting the introduction of a patented article, that the patented article may be cheaper as well as better. It sometimes happens so. A person may have discovered a method by which some article may be manufactured by a patentable process far more cheaply than it could have been before such discovery, and to exclude him as a competitor when the question of the adoption of a patented or of a non-patented article in improvements is involved, may be to prevent the purchase by the city of what it requires, at the lowest price, and we shall have a case of the city being compelled to take the unpatented article and pay for it a good deal more than perhaps it would have been necessary to pay for a thing which, although protected by letters patent, might well be sold by the exclusive owner at a lower price, because, perhaps, of a lower cost of production.

It has seemed to me, in the consideration of this question, that the ruling out of competition which involves both patented and unpatented articles is to *prevent* competition; that it interferes with competition because the scope is not so broad. Here we have a board of public service, and assuming its honesty of purpose and that it is endeavoring to obtain that which

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is best under all the circumstances for the people of this municipality, advertising for the construction of a pavement and offering to bidders the choice of a number of kinds of pavement included among which is this bitulithic pavement. Now if the bitulithic pavement were entirely excluded from the category of those which might be under consideration, or the number with regard to which proposals could have been made to the city, there would be a lessening of competition to that extent; instead of fourteen alternatives there would be thirteen, and if there were other patented materials included in the category it would be still further lessened, and instead of making a broader competition we think it makes a restricted one.

The issuing of letters patent does not confer the only kind of exclusive use or the only kind of a monopoly that may be acquired or owned by an individual or any group of individuals. There are monopolies that grow out of circumstances inherent in nature; there is a monopoly which pertains to a particular skill or particular expertness in an individual, a native genius enabling him to do a thing better than any other man can do it. There is the monopoly which belongs to a proprietary interest in some particular coal mine, in some particular gravel-pit, or other source from which the products of the earth may be extracted for the benefit of man. Shall it be said that a municipality which desires to obtain a large quantity of coal may not encourage bidders among the owners of all the coal mines, and yet those who are offering their proposals will have no power to furnish to the city some particular kind of coal which comes from some particular mine, owned by some one individual, coal which may be the best of all and possibly the only coal just adapted to the needs of the city for some power plant or other public use. If that is excluded, then the city is not permitted to avail itself of the best which can be had in the market. As has been said in the Yaryan case by my associate, the competition, under our law, is three-fold: It involves the price, the responsibility of the bidder, and the quality of the thing offered. And if you exclude from consideration any one of these things, you will, as it seems to me, violate the spirit and purpose of the law.

In the old section, 799 of the Revised Statutes, we had a provision that where a contract was let as an entirety by a municipality it must be let to the lowest bidder. When it was let in separate parts, having regard to the different trades which might enter into it, it was provided that it should be let to the lowest responsible bidder, and while Judge Doyle was on the Supreme bench he considered this Section 799 in one of the cases, not now before me and to which it is perhaps not worth while to make a special citation—it is enough to say that under the Municipal Code adopted in 1902, in this Vol. 96 O. L., we have a repeal of all prior enactments inconsistent with this new Municipal Code. Among those enactments, in my judgment, is this Section 799 which is, in spirit, repealed by Section 143 of the Municipal Code. Now the statute provides, not only that the board of public service must accept the lowest *and best* bid, but it may reject “any or all bids.” It may reject any one or any thirteen, and leave the fourteenth, if in its judgment that is the lowest and the best. Taking the two provisions together the court is not inclined to adopt the view of counsel for the plaintiff, that in the provision that the contract must be let to the lowest and best bidder, reference is had only to the responsibility of the bidder and not as well to the quality of the thing proffered.

It has been very earnestly urged, and perhaps the argument is made upon the claimed implication in the case in 42 O. S. to which I have referred, that the difficulties in the way of permitting a competitive bidding, including those with reference to a patented article, may be obviated by the city’s first procuring the right from the owner of a patent and then submitting to all bidders by advertising, the right to compete as to that use which the city itself has acquired. But, in our judgment, that would ordinarily be impracticable, for reasons which have suggested themselves to us even before we found the matter somewhat discussed in one or two cases cited, incidentally perhaps, but still discussed. An owner of a patent is ordinarily, as common experience and observation teaches us, the one best qualified, by reason of familiarity with the construction, the exclusive control of a plant for its production, the acquired

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skill for the manufacture and furnishing of the improvement, to give it to the city or other buyer upon the best terms and to carry out his proposal with the greatest efficiency, to the most complete satisfaction of the buyer. In other words, in the great majority of cases, and perhaps almost universally, the person who can make the *best bid* for a patented article is the owner or controller of the patent. But waiving this argument, it may fairly be urged that if the city could buy the right to make use of the patented article, presumably bidders could do the same; and, as suggested in some of these cases from other states, all that the bidder has to do to make his contract binding upon him is to agree with the city that he will furnish the article. Although patented and controlled by some other person or corporation, the city may hold him to it. There is no immorality in that; there is nothing contrary to law in it, if he has contracted with the city that he will procure the right and that he will then construct the patented pavement according to the terms of his contract.

In the absence of any provision in the Ohio statutes that a city may not let just such a contract as has been let here, in the absence of any provision in this statute, such as we find in the statute with reference to the city of Cincinnati, which was cited to us, containing the express terms upon which a patented improvement may be used, we are of one mind that we ought not to read into this law the restrictions and qualifications for which counsel for plaintiff contend. Wherever the exclusive right to a thing is owned or controlled, it has seemed to us that the people of a city ought not to be deprived of an opportunity to avail themselves of a useful and valuable thing simply because it is so controlled. This kind of monopoly which we guard by the issuing of letters patent is a monopoly which has been encouraged, because it stimulates inventive genius and in the end results in great good to humanity. Not much encouragement would be given to the inventor of a patented pavement if his market were restricted to individuals, if municipalities were shut out of the number of the purchasers of that which he has invented. Individuals do not ordinarily buy pavements. And the question then comes, whether it is public policy to dis-

courage invention along this line which in the end may inure to the highest benefit of the cities. We have passed through very many stages of bad roads: from the old clay roads, the corduroy and the plank roads, through the divers forms of pavement. Now we have the bitulithic pavement, which has been selected by this board of public service, and it has seemed to this court and to each member of it, that it is wise that the people who have organized themselves into municipalities should be free to avail themselves of every beneficent invention keeping pace with the world's progress.

Under all the circumstances which have been disclosed to us and so ably presented in the arguments on behalf of the plaintiff and defendants, we have no misgivings in holding that the petition herein fails to state a cause of action, and accordingly the demurrer will be sustained.

Doyle, Lewis & Schaufelberger, for the plaintiff.

U. G. Denman, for the city of Toledo.

Kinney & Newton, for H. P. Streicher.

DAMAGES ON ACCOUNT OF A STREET IMPROVEMENT.

[Circuit Court of Hamilton County.]

ROBERT CARLISLE ET AL V. THE CITY OF CINCINNATI.

Decided, March 10, 1906.

Street—Assessment for Improvement of—Damages to Property Owners Included—Cost of Grading and Lowering Street—Assessment for Surface Improvement—Effect of Signing Petition for Improvement at a Different Grade.

1. An assessment for a street improvement may be enjoined in so far as it includes damages awarded to the property owners, or the costs of the suit to assess compensation therefor, or the cost of grading or lowering the street to the new grade.
2. In an action to assess damages on account of a proposed street improvement, it is competent for the jury, while disregarding the general benefits which may result to the property, to consider an

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incidental benefit which is blended with an incidental injury, for the purpose of arriving at the extent of the injury sustained by the property.

3. The signing by a property owner of a petition for the improvement of a street to a certain grade, does not estop him from contesting the legality of the assessment, where the original petition was referred back to the property owners with the direction to file a new petition for an improvement at a different grade, and the second petition was not signed by the contesting owner.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The questions involved in this case are stated in the brief of counsel for plaintiffs, as follows:

1. Is the assessment legal insofar as it includes the damages awarded to property owners and the costs in the suit to assess compensation to the plaintiffs and others for injuries caused by the improvement.

2. Is the assessment legal insofar as it includes the cost of grading or lowering the street to the new grade?

3. What is the effect of the verdict and judgment in the proceeding to assess compensation to plaintiffs, upon the right of the city to make any assessment against plaintiffs' property for the surface improvement?

4. What is the effect of the signing by plaintiffs of the first petition for improvement of the street?

The first question is answered in the negative by the case of *The Cincinnati, Lebanon & Northern Railway Company v. The City of Cincinnati et al*, 62 O. S., 465.

The second question is answered in the negative, also, by the case of *Thale v. The City of Cincinnati*, Court Index, February 4th, 1902.

As to the third proposition, the right of an owner of a lot, bounding or abutting upon a proposed improvement, to recover damages by reason of such improvement, is guaranteed by Section 19, Article I, of the Constitution, which provides that "such compensation shall be assessed by a jury without deduction for benefits to any property of the owner." In an action brought by a municipal corporation to assess damages which an abutting lot owner claims he will sustain by reason of a proposed street

improvement, the jury may not take into account in estimating the amount of compensation to be paid to the owner, the general benefits resulting from the surface improvement of the street, yet where an incidental benefit to the lot is blended or connected with an incidental injury to such lot, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the lot. *Cleveland & Pittsburg R. R. Co. v. Ball*, 5th O. S., 568.

Fourth. Where the abutting lot owners petition for the improvement of a street at an established grade, and the petition is by the municipal authorities referred back to the property owners, with directions to file a new petition, which is accordingly done, asking for the improvement at a different grade, a lot owner not signing the latter petition according to the terms of which the improvement was made, is not estopped to contest the validity of the assessment, although he signed the original petition. *Hayes et al v. The City of Cincinnati et al*, 62 O. S., 116.

It follows that the collection of the assessment so far as it includes damages assessed in favor of the plaintiffs and also the cost of excavation to the new grade, should be enjoined, and the balance sustained.

Herman Merrell, for plaintiff.

Geo. H. Kattenhorn, contra.

COVENANTS RESTRICTING CONDUCT OF LESSEE.

[Circuit Court of Lucas County.]

THE HUEBNER-TOLEDO BREWERIES V. JOSEPH SINGLAR AND
ANNIE SINGLAR.

Decided, March 17, 1906.

Lease—Covenants Contrary to Public Policy—Restrictive Clauses Qualifying Use of Premises Leased—Or of the Conduct of the Lessee—Or of His Use of Other Premises—Distinguished from Transfer of Good Will—Is Beer a "Commodity"?—The Anti-Trust Act.

1. Contracts in restraint of trade, not connected with nor for the protection of a good will sold or leased, and which are not mere reservations or qualifications as to the use of sold or leased premises, are contrary to public policy and void.
2. The covenant of a lease binding the lessee not to sell beer of any other manufacture than that of the lessor within a radius of one mile from those leased, is void as in unlawful restraint of trade.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

This case has been submitted to the court upon a motion to dissolve a temporary injunction heretofore granted. The grounds of the motion are: (1) That the petition filed herein does not state facts sufficient to entitle the plaintiff to the equitable interference of this court by injunction; (2) that the plaintiff has an adequate remedy at law, and the injury complained of, if any should be sustained, is measurable and not irremediable in character.

This second alleged ground is manifestly involved in the first, because if the claim so stated is correct, it in itself would make the petition defective, so far as the jurisdiction of this court is concerned, as not stating facts sufficient to entitle the plaintiff to equitable relief. No other grounds are stated in the motion, and the question so presented requires an examination of the petition to determine its sufficiency or insufficiency. It is substantially as follows:

The brewing company named sues Joseph Singlar and Annie Singlar, alleging that the plaintiff is a corporation organized and existing under and by virtue of the laws of Ohio, engaged in the business of manufacturing and selling beer and having its principal place of business in the city of Toledo, Lucas county, Ohio. It alleges that at the date named Joseph Singlar was a tenant of another party of premises situated in said city, and was engaged at that time in operating a saloon thereon. That on said day the defendant, Joseph Singlar, informed the plaintiff that he had received notice to vacate said premises, and that, for the purpose of retaining possession of the same, an arrangement and agreement in writing was entered into between the plaintiff and the defendant, Joseph Singlar, as follows:

“September 9th, 1905.

“This agreement made this 9th day of September, 1905, between Joseph Singlar and the Huebner-Toledo Breweries Company, witnesseth—

“That the said Joseph Singlar immediately upon the purchase by the said the Huebner-Toledo Breweries Company of the premises owned by Michael Szopko and now occupied by the said Joseph Singlar as a saloon, said property being located on Genesee street, between Ann street and Whittemore street, in the city of Toledo, Lucas county, Ohio, and known as No. 624 Genesee street, the said Joseph Singlar will lease said premises for the period of five (5) years at the rate of ten dollars per month and that during the said period of five years said premises will be used for the sale of no other beer, including bottled beer, than of the manufacture of said the Huebner-Toledo Breweries Company, its successors and assigns, and that he will not during said period of five years engage in the sale of any beer, including bottled beer, except of the manufacture of said Huebner-Toledo Breweries Company, its successors and assigns, within one-half mile of said premises, and that he will not assign said lease or sub-let said premises, and the said the Huebner-Toledo Breweries Company agrees to purchase said premises if the same can be secured for not more than \$2,500, and that the title to said premises is clear and that there are no restrictions upon the use of said premises, and will make said lease to said Joseph Singlar immediately upon purchase of said premises.”

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The petition alleges substantially that upon the execution of this written agreement the plaintiff purchased the property mentioned for the sum of \$2,700, and immediately thereafter offered to execute to Joseph Singlar a lease for the same for the period of five years at \$10 per month, but the defendant refused to execute or accept the lease unless his wife, the other defendant named in the petition, Annie Singlar, would be made a party to the same, and thereupon and in consideration of the plaintiff agreeing to execute said lease to both said defendants the following covenant and agreement was inserted in the said lease and agreed and consented to by both of the said defendants, to-wit:

“And the said parties of the second part (Joseph Singlar and Annie Singlar) in consideration thereof, do hereby covenant and agree to pay the said party of the first part (the Huebner-Toledo Breweries Company) its successors or assigns, as rent for said premises the sum of ten dollars per month payable on the first day of each and every month, and hereby covenant that during said period of five years they will not engage in the sale on said premises or within one mile thereof of any beer, including bottled beer, except of the manufacture of said Huebner-Toledo Breweries Company, its successors and assigns.”

The petition alleges that the said defendants, Joseph and Annie Singlar, are owners of the premises known as lot No. 70 named premises are situated within one hundred feet of those described in the lease, and that the defendants, contrary premises described in the lease, and that the defendants, contrary to the covenant, or perhaps both covenants mentioned, are now engaged in selling on said lot No. 70 beer other than that manufactured by the said plaintiff, to the irreparable damage of the plaintiff. The petition says that neither of the said defendants is the owner of any property not exempt from execution, and that the plaintiff has no adequate remedy at law to protect its rights.

The prayer of the petition is for an injunction to restrain the defendants from engaging in the sale, for five years from September 9, 1905, on said lot No. 70 in Robison's Riverside

Addition to the city of Toledo, Lucas county, Ohio, as principal, agent or employe, of any beer except that manufactured by the Huebner-Toledo Breweries Company, its successors and assigns, and for such further relief as may be equitable.

It may be premised in the consideration of the issue presented that the covenant in the lease which was finally executed by all parties to this case supplanted the covenant incorporated in the original contract between the plaintiff and Joseph Singlar. His wife was brought into the second arrangement, and the territory over which the restrictive clause was intended to operate was enlarged; instead of being confined to a space of one-half mile from the leased premises it was extended to a space included in a circumference of one mile therefrom.

The substantial question, and almost the only question involved, is as to whether such a covenant as we have before us is valid and enforceable in equity, or whether it is contrary to public policy and void. In the able arguments made orally and upon brief to this court many adjudications have been cited bearing more or less closely upon the question stated. It is unnecessary and would not be profitable to recapitulate or review all of these decisions, or indeed, very many of them. It has seemed to myself that some confusion has arisen, not only in the argument, but in the language of some of the judges rendering the decisions to which we are cited, growing out of the fact that no close distinction is taken between a reservation of the use of property leased or conveyed and a restriction upon some action of the vendor which is intended to protect the vendee in the possession of property and any good will which may attach to it.

In the one class of cases, we have such clauses as that found in the case of *Steins v. Dorman*, 25 O. S., 580. This was a qualification of the use of the premises transferred, and a similar qualification perhaps is that found in one of the principal cases cited by counsel for the plaintiff, *Ferris v. American Brewing Co.*, 155 Ind., 539.

The covenant in the other class of cases is almost, if not quite, invariably associated with a sale or transfer of good will

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attaching either to premises or to a person. It may involve a trade which has grown up and has become a sort of an appurtenance to some premises used for mercantile purposes or otherwise, or it may have reference to the personal skill of a vendor; but in either case it involves the protection to a vendee of the full benefit of his purchase.

In such case the clause is not, in one sense, restrictive. It indeed restricts the right of the vendor to do certain things, but there is no restriction upon the vendee. But in the other case to which I have referred—in the first class mentioned—the restriction is not upon the vendor at all, but it is upon the vendee. It is a qualified use of the premises leased or sold. It is just as clearly so as in a dedication of land to a city for the purposes of a street or any public structure, or in a lease of property to be used as a hotel or saloon, or any other structure or business.

In the one case, it is a reservation from the conveyance itself. In the other case, it is a restriction upon conduct of the vendor or lessor, designed to prevent him from interfering with the full use of that which he has granted or leased to his vendee or lessee. In the adjudications which have been cited to us, and others which we have examined, we have found it not very hard to make this classification. And no case has been cited wherein a contract, which is purely restrictive upon a vendee or lessee and where there has been no possible conveyance to him of a good will attaching either to a person or premises, has been upheld. In other words, in all these cases where an attempt has been made to restrict the conduct of a vendee or lessee, or to restrict the conduct of any one else (although upon an ample consideration perhaps), so as to prevent full liberty of action by him in carrying out his vocation, whatever it may be—I say that in no case of this character have we been able to find adjudications upholding such covenants.

Now, in the case at bar, it is not claimed in the petition that the qualified use of the leased premises has in any way been violated by the vendee. There would seem to be no question that the plaintiff, being the owner of the premises leased, had a

right to insert in the lease any qualification as to use that seemed advisable and to the interest of the lessor. But the question here is not that. The question is as to the power of the lessor, in consideration of the purchase of the property and the leasing of it to the lessees, to bind the lessees by contract not to engage elsewhere in the business of vending beer other than that manufactured by the plaintiff.

Some suggestion was made during the argument before us that the so-called Valentine Anti-trust Law of Ohio might have application here, and the response was made by one of the counsel that this act has been declared unconstitutional by one of the circuit courts of the state. This seems to have been correct. But it also appears that by a very recent adjudication of the Supreme Court the act has been upheld, and in the upholding of the statute the judge rendering the opinion for the court has announced some principles which may be a guide to us in the consideration of this case. We refer to the case of *The State of Ohio v. Gage*, 72 O. S., 210.

Before reading from this opinion, or from the statute which it upholds and to a certain extent construes, I will make some reference to a question incidental to the one under inquiry, which has received consideration from the courts of some states. It is this: Whether any public policy of the state is infringed upon, or violated, by a restriction upon the sale of a commodity of the kind mentioned in this petition and in this contract. It is not exactly an article of food, nor an article of use, in the ordinary sense, otherwise perhaps than as a beverage, and yet, under the broad language of the statute of Ohio to which I have referred, it may well be said that to except beer from the definition of the term "commodity" would be judicial legislation. In the case of *Anheuser-Busch Brewing Association v. Houck, et al*, decided by the Court of Civil Appeals of Texas in 1894, and reported in the 27th S. W., 692, it was held:

"1. A contract by a brewing association with dealers in a city to furnish them beer in bulk, and not to furnish it in bulk 'to any other party' in such city for one year, is not void as against public policy and in restraint of trade, so as to prevent a recovery for beer sold thereunder.

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“2. A combination of persons and firms in a city for the control of the sale of beer and the cessation of competition *inter se* is not void at common law as against public policy, although in restraint of trade, since beer is not an article of prime necessity, and its sale is closely restricted by public policy.

“3. The act of 1889 relating to conspiracies against trade, forbids combinations of persons or corporations to prevent competition in the purchase, sale, or transportation of merchandise, and all agreements not to sell below a certain or graduated price, or to establish ‘the price of any article or commodity between themselves and others to preclude free competition among themselves or others in its sale or transportation.’ *Held*: That a contract between liquor dealers in a city for the control of the beer traffic there and in all markets tributary thereto, each turning ‘all the beer he or they may handle or control into this co-partnership,’ violates the above statute, and is void, although the persons so combining are the only dealers in the city, and the price was not increased to consumers.”

I need not read from the case because this question was not especially, if at all, argued before us by counsel, but in our consideration of the matter the question has occurred to us and perhaps should be met in passing.

The Ohio statute passed upon in the case of *The State v. Gage, supra*, is in the the 93d Ohio Laws, 143. Eliminating such portions of the act as have no special reference to the present case, it appears from its title that, among its other objects, is the promotion of “free competition in commerce and all classes of business in the state.” Section 1 provides:

“That a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:

“1. To create or carry out restrictions in trade or commerce.

“2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.”

Stopping for a moment, it may be said that it was argued during the presentation of this motion to us that the effect of this covenant and its execution would not be the reduction of production or increase of the price of beer in the circumscribed territory. But it is to be noted that this statute has

application to other matters than the mere limitation or reduction of production or increase of the price of merchandise or any commodity. That is only the second clause of this statute. The first, as I have read, is the creation or carrying out of restrictions in trade or commerce, and nothing is said in that clause as to the effect of such transactions. The section continues:

“3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce, or any commodity.

“4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

“5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void.”

Section 8 provides—

“That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity.”

Section 9 provides—

“That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.”

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Along the same line, and following the principle of the decision in the Texas case to which I have referred, we have the case of *Alice G. Carr v. The J. Walker Brewing Company et al*, decided in the Superior Court of Cincinnati, General Term, February, 1906, and reported in Vol. 3, *Ohio Law Reporter*, page 618, Judges Ferris, Hoffheimer and Caldwell uniting in the opinion. The syllabus reads:

“The laws of Ohio with reference to the liquor traffic have always been more liberally construed than in some of her sister states, and the Ohio law rendering void all contracts in restraint of trade is applicable to contracts having reference to the sale of liquor.”

I am not quite sure that this court would go so far as to say that the laws of Ohio are more liberal than the laws of other states in this respect, and indeed, this superior court says only that they have always been more liberally construed than in some of her sister states, especially, one of my associates suggests, in Indiana. The contract involved in the case cited was one wherein under a transfer, or in connection with a transfer of the good will of certain premises, the vendors, Alice G. Carr and Thomas Gilmore, stipulated as follows:

“* * * we will not again enter into the grocery or saloon business within three blocks or squares, east, west, north or south, of said premises, within eighteen months from date hereof.”

It will be noted that this case falls within the class of contracts which I have heretofore mentioned as coupled with the transfer of the good will, and designed to afford to the vendee the fullest protection in the enjoyment of the property and all the good will which has grown up in connection therewith. The court in this case held that the contract was so in restraint of trade as to be void, seemingly relying upon several adjudications of Ohio which have been cited in the case before us, including *Lange v. Werk*, 3 O. S., 519; *Field-Cordage Company v. Cordage Company*, 6 C. C., 15; *State v. Gage*, 72 O. S., 210.

Resuming consideration of the Gage case, Judge Shauck, on page 229, says:

“The purposes named in these sub-divisions do not relate to any contract with respect to the use of one’s property or his faculties. They are purposes which made contracts void at common law as being opposed to public policy, which, according to legal views which still prevail, requires that the conditions of competition be maintained. They are also within the combinations which were prohibited by many ancient statutes.”

Some force is attached to the use of such language as this by counsel for the plaintiff, who earnestly urge that the Ohio anti-trust statute is after all but a placing of penalties upon transactions which before were so unlawful as to be non-enforceable as contracts. But upon pages 230-231 the judge gives expression to some ideas as to what classes of contracts would be deemed contrary to public policy under the Ohio adjudications, even prior to the enactment of this statute.

On page 230:

“Brief attention to the development of the law upon the subject will show that argument” (along a certain line which he mentions) “would be unavailing rather than unnecessary. So long recognized and so frequently applied in the same jurisdictions that their congruity must be admitted are the doctrines that every contract in restraint of trade is void if nothing else appears; but, nevertheless, that property used in the competition of trade may be sold, including the good will of the vendor’s business, and that to effectuate the sale of the good will, the vendor may make a valid stipulation to abstain from competition if the stipulation is limited to that purpose.”

In other words, if the stipulation is limited to the protection of the good will, then it will be enforced. He continues: “And courts of equity have even required members of a co-partnership to abstain from the conduct of a rival business.”

The reason for this is manifest. It would interfere with the purposes of a partnership; it would interfere with the interests of the co-partners. And he adds:

“In short, the courts have uniformly denounced contracts in restraint of trade unless the restraint results as an incident from the use of one’s property and his faculties. The distinction is one of easy grasp and it is too late to question its

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importance. Within the limits of the present case, it is obvious that the effect of the statute is to prohibit affirmatively such contracts and transactions as were previously unlawful, but which could be so adjudged only when the aid of the courts was invoked for their enforcement. It must be obviously unavailing to urge the constitutionally protected right to make contracts with reference to one's property and his faculties as an objection to a statute which does not prohibit or restrain the power of making such contracts."

Now, manifestly, a contract which provides that one selling a business in a certain locality shall not himself enter into competition in that locality with the person to whom he has sold, in the carrying on of the same kind of business, is a very different thing from a contract, based upon no matter how valuable a consideration, that some person to whom a property is sold shall not enter into competition with the vendor in any other localities than on the particular premises so conveyed. It may be said, indeed, that the restricting of the use of the premises conveyed is in partial restraint of trade. So it is; but it is the kind of reservation which a person has a right to make in his grant. Deeds have been not unusual, and have been upheld, that contained the provision that no liquor shall be sold at all upon the premises conveyed, or if any sales of liquor are made, that the title shall revert to the grantor. It is said that the city of Vineland, New Jersey, is practically under prohibitory law by reason of the incorporation of such clauses in the title deeds of vendors of the property. And there is no more reason to set aside and ignore as invalid, contracts or reservations of this character in conveyance or leases than there would be to set aside a restriction to a particular use of property conveyed to be used as a church, or a school, or a street, or an alley. In all these cases the grantor keeps something back. He does not sell all he has. He may not desire to use, and may not be able to use, the property for any purpose himself, but he may put a qualification upon its use by his vendee or his lessee.

Some confusion may arise in the mind here from the fact that the consideration of this covenant is the leasing of a par-

ticular property, but to our minds it is not different from a case where, in consideration of a money payment or any other valuable thing, a person agrees to keep out of a certain market in the way of buying or selling or manufacturing any kind of commodity.

It is to be noticed that there is no stipulation in this contract, no provision whatever, that the Huebner-Toledo Breweries Company shall sell any of its beer to these defendants. There is no power, in other words, left or given by this lease to the covenantors in it—to the defendants—to continue in the business of selling beer at all, unless by the permission, express or tacit, of the lessor. If the breweries company should conclude not to furnish the defendants with beer, and if this covenant were to be upheld, the defendants would be deprived of any power to use such skill as they may have in the carrying on of this business anywhere within the circumscribed territory. In other words, they could be put out of the trade entirely by the will of the lessor. There is no provision in this writing either that the lessor shall furnish or that the lessees shall buy any of the beer manufactured by the plaintiff, but the provision strikes entirely at the conduct of the lessees with reference to the beer manufactured by other people or concerns.

In this connection some reference may be made to the principle stated in 2 Beach Modern Law of Contracts, Section 1565, as follows:

“There are two grounds on which rests the doctrine that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party’s industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family.”

And in the same connection, 1 Page on Contracts, Section 432, should be cited.

In the case of *People v. Stock Exchange*, 170 Ill., 556-567, it is said:

“The common law refused to recognize restrictions upon trade and business among citizens of a common country. Under this

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rule of the common law the right of the laborer to dispose of his skill and industry, and to contract in reference to the same with whom he pleased and at such contract rates as might be agreed upon, was recognized and not allowed to be trammelled with restrictions which interfered with individual action and liberty.”

There is a recognition in this decision of the principle enunciated in the text-book to which I have referred, 2 Beach Modern Law of Contracts, that the policy of the legal rule is two-fold, and that one of its objects is the protection of the individual in the right to use his own faculties. Reading further from the case:

“Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law.”

And taking up the other phase of the proposition the judge says:

“Effort to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law.”

In further support of the views which I have been endeavoring to express I read from this Illinois case as follows:

“* * * it seems that the only cases, apart as we have indicated from those just mentioned, in which there can be any legitimate occasion for a covenant on the part of one not to engage in the business proposed to be carried on by another, are those in which the covenantor has sold to the covenantee his stock in trade, as in the case of a merchant, or his part of it, as where one mercantile partner sells out to the other or to a stranger, or, being a professional man with an established practice, as a physician, dentist and the like, or mechanic with a shop and accustomed patronage, as a blacksmith and the like, or, if he be a manufacturer, sells out his practice or business or plant, with or without an express stipulation as to its good will, and in the same transaction and as part of the thing sold

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and as in part the consideration for the price paid, agrees not to engage in that business, profession or trade, as the case may be, within the territory covered or supplied by the business, practice or factory purchased during the time the vendee shall be interested therein. * * * But there is no room for the application of these reasons in cases in which the covenantee does not purchase the business, practice, trade or plant of the covenantor and the transaction involves nothing but a bald covenant in restraint of trade for which there is no other consideration than the payment of money for the obligation itself. In such cases the business of the covenantor is not transferred merely; it is destroyed.”

Referring further to the loss to the public by reason of restriction upon the use of the faculties of an individual, the judge says: “Labor is thrown out of employment; ‘the same number of mouths’ are not fed.”

In other words, the laborer, instead of being a producer, becomes a consumer. Further:

“The consideration the covenantor receives is not the just reward for his skill and energy and enterprise in building up a business, but is a mere bribery and seduction of his industry and a pensioning of idleness. The motives actuating such a transaction are always in a sense sinister and baleful.”

We should hardly like to say that here. The motives may be, and probably were, altogether innocent; that is, there may have been no thought of any impropriety in the making of such a contract, or any idea on the part of any of these parties that they were either violating public policy or a public statute.

Some suggestion having been made in argument that no restriction of this character should be upheld unless coupled with a sale of good will, it seems to have been understood on the other side as a claim that there can be no sale of good will except in connection with some tangible plant, some real estate, or some other property to which the good will pertains. If counsel for the motion entertained that view, we think that it would be going too far. There may be such a thing as a sale of good will as appertaining to a professional business, or an industry, where there has been no transfer whatever of

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any tangible property, real or personal. The cases mentioned in this Illinois report of the sale of the professional business of a lawyer or a doctor would be an illustration of a class of cases where the good will may be sold in connection perhaps with a business, but without any transfer whatever of any other property right; but still it is a sale of the good will. And sometimes it may be coupled with a direct sale of one's own faculties, or one's own skill in business, in connection with a covenant that while working for the covenantee he will give the covenantee the benefit of his whole time and he will do no work for any one else. This is the kind of contract which we find often in the employment of agents or salesmen, wherein the work of the person employed is given exclusively to the employer.

I have given perhaps more time than I ought to the consideration of this case, but I have done it in view of the importance and interest of the question presented, and also the fact that our view is not in accord with that which seems to have been entertained by the court below.

I might add to all that has been said that a reading of this petition does not disclose any apparent danger to the petitioner that it will suffer damage by reason of any act or conduct of the defendants. It is not said in the petition that there is any threat of a continuance of sales. It is not said that the defendants have, or ever have had, any good will of value pertaining to the saloon in which it is said they are now engaged in business. As already indicated, there is no averment that the plaintiff was to supply them with beer. There is no averment that the defendants are selling other beer than that manufactured by the plaintiff in the saloon which was leased by the plaintiff to the defendants. There is no averment that the defendants, or either of them, have any personal skill or ability whatever to sell beer, or have any patronage, any custom, which has grown up, which it would be a loss to the plaintiff not to have turned to the purchase of goods manufactured by it. All of these latter matters, to which I have referred, might perhaps be cured by an amendment to the petition, provided the facts exist which would warrant such amendment. But the other con-

siderations which have been given to the particular covenant itself and the principles of law governing its construction and the determination as to whether it is valid or invalid, enforceable or non-enforceable, would seem to be vital to the rights of the parties and hardly susceptible of change by amendment.

Our conclusion is that this motion should be sustained, that the injunction should be dissolved, and it will be so ordered.

Swayne, Hayes, Fuller & Tyler and *G. P. Hahn*, for plaintiff in error.

F. C. Schaal and *Fell & Connolly*, for defendants in error.

ASSUMPTION OF LIABILITY UNDER SUIT FOR PERSONAL INJURIES.

[Circuit Court of Hamilton County.]

THE JOHN KAUFFMAN BREWING COMPANY v. JOSEPH BETZ.

Decided, March 31, 1906.

Negligence—Pleading in Suit for Personal Injuries—Amendment as to Cause of Injury—Assumption by Company of Contracts and Liabilities Incurred by Receiver—Promise Inures for Benefit of Third Person—Special Findings by Jury—Charge of Court.

1. An amendment to a petition does not state a new and different cause of action, where in both the amended and original petition the object sought is recovery of damages for the same personal injuries, the variation being only as to the precise manner in which the injuries were inflicted.
2. Where a receiver turns over to the company owning it the plant and assets in his hands, upon the condition that all contracts and liabilities incurred by or incumbent upon him as receiver shall be assumed by the company, a suit against him as receiver for damages for personal injuries is included therein, and the obligation thus assumed for the benefit of others is enforceable by a third person coming within its provisions.
3. A special finding by the jury to the effect that the plaintiff was under the control of a foreman who is named, does not entitle the defendant to a judgment on the ground that the accident hap-

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pened in a different department, where the testimony shows that at the time of the accident the plaintiff's duties had taken him into another department and under the control for the time being of the foreman of that department.

4. A refusal to permit the jury to take the general charge to the jury room is not error, where the court was not requested to reduce the charge to writing, but did so for his own convenience and protection.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The plaintiff below, Joseph Betz, brought an action against the John Kauffman Brewing Company to recover damages for a personal injury received while in the employ of Frank H. Shaffer, as receiver of the brewing company. The accident occurred while the plaintiff was assisting in removing an obstruction to the free operation of a freight elevator used for carrying materials between the wash-house on the ground floor and the second cellar below. The negligence charged in the petition was the faulty construction and want of repair of the elevator.

It is further averred, in substance, that on the second day of October, 1901, an action was commenced against the receiver to recover damages for such injury, and that in April, 1902, in the cause in this court, wherein a receiver was appointed, he filed his account, which was approved by the court and he was ordered to transfer to the brewing company all assets in his hands, on the condition that said company assume all contracts and liabilities then incumbent upon the receiver. Thereupon he transferred to the company all assets, and the company in open court assumed all liabilities, the receiver being discharged and the brewing company giving bond to the receiver to indemnify him and his bondsmen from all liability incurred by him in carrying on the business which might not yet have become due and liquidated and assuming the liability of the receiver to this plaintiff as aforesaid; and that said action commenced by this plaintiff against the receiver was thereupon dismissed without prejudice to the commencement of another action.

After the jury was impaneled, the plaintiff with leave of court and against the objection of defendant, filed an amendment to his petition in which he avers that a superior servant of the receiver ordered him to go from the wash-room into the cellar where the obstruction to the elevator existed, and assist in removing it; that while attempting to do so, such superior servant carelessly caused the elevator to be moved whereby the plaintiff was thrown from the first cellar to the floor in the second cellar, from which he sustained the injuries complained of.

Defendant by answer denies all allegations of negligence or carelessness contained in the petition and amendment thereto, and avers that the injuries resulted solely from the negligence and want of proper care of the plaintiff and contributing directly thereto.

The first alleged error is the allowance by the court of the filing of the amendment to the petition, the claim being that it states a new and different cause of action. In each of the pleadings, the object sought is the recovery of damages for the same personal injuries. The precise manner in which the injuries were inflicted, whether through defects of the elevator or the negligence of a superior servant, each being imputed to the receiver, was of secondary importance. In the case of *Spice & Son v. Steinbruck*, 14 O. S., 213, the first proposition of the syllabus is as follows:

“The restriction upon amendments in Section 137 of the code, that the proposed amendment ‘must not change substantially the claim or defense’ does not refer to the form of the remedy, but to the general identity of the transaction forming the cause of complaint, therefore,

“2. Where the original petition demanded damages for a wrongful arrest, under an order issued by a justice of the peace, containing averments making a case of malicious prosecution, an amendment, striking out the averment of ‘want of probable cause,’ and alleging that the same arrest was made ‘illegally and with force,’ may be allowed, if it conform the pleading to the proof, upon such terms as may appear proper and just to the court.”

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If such an amendment may be made by conforming the pleading to the facts proved, with much greater reason should it be allowed before the case is tried, and especially under that general clause of Section 5114, Revised Statutes, which permits an amendment "by inserting other allegations material to the case." There was no error in permitting the amendment to be filed.

The next alleged error is the refusal of the court to direct the verdict in favor of the defendant when the plaintiff rested his case. It is claimed that the brewing company did not assume the plaintiff's claim for damages against the receiver. The entry confirming the final account of the receiver contains the following:

"And it further appearing that all creditors of the Kauffman Brewing Company, who have an interest in the funds in the hands of said receiver have been fully paid and satisfied, except the following: Bernard Bing, \$998.14; S. B. Bing Soehne, \$1,074.71; Crystal Lake Ice Co., \$8.77; L. A. Greiner & Co., \$2.16; W. P. McLaughlin, \$3.45, and H. Schile & Sons, \$66.22, it is ordered that a special deposit of an amount sufficient to pay said claims be made in the Atlas National Bank out of which said claims shall be paid when presented for payment.

"It is further ordered that a bond in the sum of \$15,000 with sufficient sureties to the satisfaction of said Frank H. Shaffer be given by the John Kauffman Brewing Company, to indemnify said Frank H. Shaffer and his bondsmen from all liability incurred by him in carrying on the business which may not have become due or been liquidated.

"All of which have accordingly been done and all fees and charges of the receiver and his counsel having been paid in full it is now ordered that said receiver transfer and assign to the said the John Kauffman Brewing Company all assets of the trust now in his hands on condition that said company assume all contracts and liabilities now incumbent upon said Frank H. Shaffer as said receiver incurred by him in the administration of the trust. And thereupon said receiver in open court formally transferred to said company all said assets and said company assumed all of said liabilities."

Some contention is made that the words "contracts and liabilities" are not broad enough to include the claim for damages

or a suit for tort, but we think they include any obligation which the receiver might assume or be subject to in the administration of the trust, and liabilities other than contracts would naturally include a claim such as that of the plaintiff.

It is urged, however, that the plaintiff not being in privity with either the brewing company or the receiver, can not avail himself of the agreement between the brewing company and the receiver. It has repeatedly been held in this state that if one person upon a sufficient consideration make a promise to another for the benefit of a third person, such third person may maintain an action at law upon the promise. Nor need he be named, especially, as the person to whom the money is to be paid. Counsel cite us to the case of *Railroad v. Bank*, 54 O. S., p. 60, at page 69 where Spear, J., says, in commenting upon the case of *Emmit v. Brophy*, 42 O. S., 82:

“No one of the cases cited carries the doctrine further than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to amounts not specified or then ascertainable to the extent of giving to such creditors the right of action on the contract.”

The meaning of this evidently is that if a creditor is not named, and not known, and the amount of his claim is not specified or then ascertainable, the parties to the agreement could not have had in contemplation such a creditor or his claim; or, in other words, that the agreement discloses no such intention.

In this case, the plaintiff, although not named, is known to have a pending suit against the receiver for the same cause of action stated in the petition in this case, and although the amount which the court or the jury may award is not then ascertainable, the identity of the claim and the maximum amount which may be recovered was fixed by the petition in the suit pending against the receiver. When we consider that all the creditors had been fully paid or provided for by a deposit in the bank, it is not unreasonable to conclude that the parties

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had in contemplation this very claim among others although the amount of the bond executed is ten thousand dollars less than the amount prayed for in the petition. A case in many respects like this one, is that of *Ryan v. Hays*, 62 Tex., p. 42, in which the 8th paragraph of the syllabus is as follows—

“The resolution of the directors, providing for an indemnifying bond to the receiver, inured to the benefit of any one contemplated by it, having a just debt or claim against the receiver as such, or personally.”

If the plaintiff had prosecuted his suit against the receiver to final judgment, it could be satisfied only out of the funds in his hands as directed by the court appointing him, unless he was personally at fault (*Meara's Adm'r v. Holbrook et al.*, 20 O. S., 137). Nor would he be subject to any liability after his discharge. It seems, therefore, that the court instead of reserving jurisdiction over enough of the funds to satisfy any existing claims, authorized the execution of the bond and the release of the assets upon the understanding that whatever judgment might be obtained would be paid by the brewing company, or on default, a resort might be had to the bond. The motion to instruct the jury to return a verdict for the defendant was properly overruled.

The next error assigned is the refusal to enter judgment in favor of the defendant on the special finding of fact made to the jury in answer to interrogatories submitted to them, and especially upon the first, which is as follows:

“Was the plaintiff at the time he was injured a cellar man, and under the authority and control of Wendelin Ludwig as cellar boss or foreman?”

“Answer. Yes.”

The amended petition contains the averment that the accident happened by reason of the negligence of Charles Roehrig, foreman in the wash-room, and the uncontradicted testimony is that plaintiff when employed by John Kauffman, the general superintendent in the brewery, was directed and commanded to obey the orders of Charles Roehrig, and that such authority

was never withdrawn except as may be implied from the fact that the plaintiff was transferred from the wash-room to the cellar, where Ludwig was boss. But the duties of the plaintiff required him to transfer chips, via the elevator, from the cellar to the wash-room, and after washing the same to return them to the cellar; he necessarily, therefore, came in contact with the cellar boss and the boss of the wash-room, and it is not unreasonable to assume that the jury may have found that the plaintiff while in the wash-room was under the authority and control of the foreman of that department, although they found that at the time of the accident Roehrig, the cellar boss, also had authority and control over him. The motion was properly overruled.

Another ground of error is that the court refused to allow its written general charge to be taken by the jury to the jury room. It appears that the court was not requested to reduce this general charge to writing, as provided by Section 5190, Revised Statutes, but that it was done for the convenience and protection of the court itself, and, therefore, was not such a written charge as the section requires to be taken by the jurors in their retirement.

We have considered the objections to the general charge and the special charges given at the instance of the plaintiff, and the refusal to give certain special instructions at the request of the defendant; and also the admission of certain evidence on behalf of Betz, and objected to by the brewing company, and our conclusion is that no substantial error has intervened prejudicial to the rights of the defendant and the judgment will be affirmed.

Worthington & Strong and *Renner & Renner*, for plaintiff in error.

Horstman & Horstman, for defendant in error.

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Cuyahoga County.

LIMITATION OF ESTATE OVER VOID FOR REPUGNANCY.

[Circuit Court of Cuyahoga County.]

ELIZABETH STEUER V. JOSEPH STEUER ET AL.

Decided, February 21, 1905.

Wills—Disposals of Estate in Fee—Attempted Limitation of Estate Over, Void for Repugnancy.

Under a will containing a devise to A generally, with no power of disposal expressed, but followed by a devise to B of what shall remain undisposed of at A's death, A takes an estate in fee simple and the attempted limitation over is void.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Appeal from the Cuyahoga Common Pleas Court.

This is an appeal in a suit for partition. Jacob Steuer died testate, leaving a widow and children. Afterwards his son Thomas died intestate, leaving a widow, who is plaintiff here. Later the elder widow died testate. Her will gives Thomas' widow \$200 and divides the rest of the property among the other children, defendants here. Plaintiff claims that Jacob Steuer's will gave his widow a life estate only, with remainder over to his children, and that Thomas' interest having thus vested in the latter's lifetime descends to plaintiff. Defendants claim that under Jacob Steuer's will his widow took a fee, and that the testator's attempt to control the disposal of what should remain of the property at her death is ineffectual. The essentials of the will are as follows:

"I give, devise and bequeath to my beloved wife, Anna Marie Steuer, my real estate and personal property of every description.

"I appoint my said wife, Anna Marie Steuer, executrix of this my last will and testament.

"It is my will that whatever is left of my estate after my wife's decease, shall be equally divided amongst all my children."

Wills of this character may contain any of four sorts of provisions, viz.:

1. Devise to A in terms for life but with absolute power of disposal and followed by a devise to B. A's estate is not enlarged by the power into a fee but is for life only. The power is simply annexed. This is illustrated by *Bishop v. Remple*, 11 Ohio St., 277.

2. Devise to A generally with absolute power of disposal but followed by a devise of the entire estate to B. A's estate is for life only. This limitation over of the corpus of the estate is illustrated in *Baxter v. Bowyer*, 19 Ohio St., 490. Some authorities, however, deny the rule thus formulated, though they approve the decision cited, on the ground that the power given was not absolute but restricted to the benefit of the estate.

3. Devise to A generally but with qualified power of disposal and followed by a devise to B of what shall remain undisposed of at A's death. A's estate is for life only. *Johnson v. Johnson*, 51 Ohio St., 446, illustrates a qualification of power whereby the first taker's right of disposal is restricted to what may be consumed.

4. Devise to A generally with no power of disposal expressed, or with an absolute power, but followed by a devise to B of what shall remain undisposed of at A's death. A takes an estate in fee simple and the attempted limitation over is impossible and void. *Widows' Home v. Lippardt*, 70 Ohio St., 261, affords illustration of a will of this sort. Though the decision there turns finally on the construction of the power rather than of the estate devised, yet the authorities cited approvingly in the court's opinion clearly establish the rule as thus formulated.

Jacob Steuer's will is of the fourth sort and we hold that the interest acquired thereunder by his widow was an estate in fee simple; that the attempted limitation over is void for repugnancy; that their son, Thomas, took nothing under his father's will and that he consequently transmitted to his widow no interest in the estate left by his father.

The petition is, therefore, dismissed at plaintiff's costs.

J. W. Sykora and W. C. Rogers, for plaintiff.

Foran & McTighe, for defendants.

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Scioto County.

FEES OF SHERIFFS.

[Circuit Court of Scioto County.]

FRED C. KETTER v. THE BOARD OF COMMISSIONERS OF SCIOTO
COUNTY, OHIO.

Decided, March, 1906.

County Commissioners—Capacity of, to Sue for Recovery of Money Wrongfully Paid Out of County Treasury—Fees of Sheriffs—For Conveying Prisoners to Workhouse—For Conveying Insane Patients to Asylum—And Committing and Discharging Prisoners from Jail—Statutes Construed—Section 1230b Unconstitutional for Lack of Uniformity of Operation.

1. While Section 1230 allows thirty cents for making service and return on each writ in conveying sentenced prisoners to the workhouse in Cincinnati, Ohio, there is no provision therein for payment from the county treasury; but Section 1536-372 (Revised Statutes 2101), provides for the allowance of such fees, and that the same be paid out of the county treasury.
2. Section 719 as amended and appearing on page 296 of 97th Vol. of Ohio Laws, passed April 23, 1904, includes all compensation to which a sheriff is entitled for conveying persons to the asylum at Athens, Ohio, upon the warrant of a probate judge.
3. Section 1230 allows thirty cents for committing persons to jail and discharging them therefrom, but it is not available to the officer for the reason stated in the first clause above. Section 1230b provides for such allowance, and that it shall be paid out of the county treasury, but said section is in conflict with that part of Section 26, Article II of the Constitution which provides that "All laws of a general nature shall have a uniform operation throughout the state," and is therefore unconstitutional and void, and the sheriff has no recourse for such services other than is found in Section 1231, Revised Statutes.

CHERRINGTON, J.; JONES, J., and WALTERS, J., concur.

The suit below was by the Commissioners of Scioto County, Ohio, to recover from Ketter, who was the duly elected, qualified and acting sheriff of this county, certain sums he had collected, viz., fees which were collected and taken from the treasury of Scioto county, claimed to be without warrant or provision of law.

The petition contains six causes of action. Certain arrangements were made as to three of the causes, after the institution

of suit and after disposition of demurrers to them respectively, which are now out of the case, and there are left simply the first, fourth and sixth causes of action.

The defendant demurred to each of the three causes, assigning two grounds:

First. That plaintiff had no legal capacity to sue.

Second. That neither of the causes stated facts sufficient to constitute a cause of action.

The court overruled the demurrer to each of these causes and entered up judgment for the commissioners. Error is prosecuted here, and it is claimed the court erred in overruling the demurrer on each ground stated in the demurrer.

And first, as to whether or not the commissioners have capacity to sue, it is sufficient to say that Section 845 expressly confers authority upon the commissioners to sue in this and like cases.

The next question is, as to whether or not the several causes of action, or either of them, state facts sufficient to constitute a cause of action.

Counsel have argued at length, both orally and on briefs, referring to various sections of the statutes, which it is claimed govern this case, but I will not undertake to follow the line of the argument, because it would be very troublesome to do so—to refer to these various sections of the statutes; and it must be admitted that the statutes of Ohio on this subject are in a confused, and I may say, a somewhat incoherent condition, and I will do little more than briefly refer to the sections which we think control in the case; and it will be well in the beginning to bear in mind that the sheriff and other officers of the county are entitled to just such fees and compensation as are provided by statute, and none other.

Now, the first cause of action was to recover twenty-five cents which the sheriff had charged on each writ for making service and return thereof in conveying sentenced prisoners to the workhouse in Cincinnati, Ohio.

Counsel for the sheriff claim that he is entitled under Section 1230, Revised Statutes, to the amount charged. Section 1230 provides that he shall have for levying and serving of each writ,

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not only twenty-five cents which he has charged, but thirty cents; but when you follow out the section of the statute it will be discovered that there is no provision for payment from the county treasury. So this is not an available section as far as payment is concerned to the officer.

Then the question is, whether there is any other section which provides how the payment shall be made. Section 1536-372 (Revised Statutes, 2101), provides:

“The officer having the execution of the final sentence of any court, magistrate, or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced; and all officers shall be paid the fees therefor allowed by law for similar services in other cases, such fees to be paid when the sentence is by the court, out of the county treasury, and when by the magistrate, out of the township treasury.”

That seems to be a general statute, and we think it gives ample provision for the payment of not only twenty-five cents which he has charged under Section 1230, but thirty cents. •

Section 6801a, which the prosecuting attorney cites as exclusive of and superseding 1230, allows six cents for transporting a prisoner to the workhouse and nothing more. But it will be observed that that section provides for the transportation of such persons where it is done under an agreement between the commissioners of the county where the conviction took place, and where it has no workhouse, and the proper authority in another county where a workhouse is located. And it seems to provide simply for the transportation and nothing further.

“And the sheriff, or other officer transporting any person to such workhouse shall have the following fees therefor,” *i. e.*, for transportation six cents per mile, etc. So that is not exclusive. We think, harmonizing and construing Section 1230 and 2101 together, that he is entitled to such service as he has charged, and that the court erred in overruling the demurrer to the first cause of action.

The fourth cause of action is for serving and returning warrants to convey certain persons to the asylum at Athens, Ohio.

We think Section 719 as amended and appearing on page 296 of the 97th Vol. of Ohio Laws, passed April 23, 1904, is

decisive of and conclusive as to that matter. That provides for payment—"to the sheriff, or other person other than assistant for taking an insane person to a state hospital, or removing one therefrom upon a warrant of the probate judge, mileage at the rate of five cents per mile, going and returning, and seventy-five cents per day for support, and mileage at the rate of three cents per mile for the railway transportation of each patient to and from the hospital, and to one assistant five cents per mile each way, and nothing more, for said service, the number of miles to be computed in all cases by the nearest route traveled.'

We are satisfied it was the intention of the Legislature that this section should cover all compensation to which the sheriff was entitled, as stated herein, and that it does not include the charge made in the fourth cause of action, and the demurrer thereto, and judgment thereon was proper.

The sixth cause of action are charges for committing persons to jail and discharging them therefrom. The only section we can find bearing upon this subject is the original Section 1230. There were others cited, but we do not think they apply.

Now this Section 1230 allows for such charges, sixty cents, but as in the first cause of action stated, there is no provision as to how it shall be paid. There is no provision that it shall be paid out of the county treasury or otherwise. So that is not available to the sheriff, and we know of no other valid section allowing and providing for this matter.

Section 1230b does provide for this allowance and that it shall be paid out of the county treasury; but it will be noticed that it applies to a certain class of counties only, and it is an act attempting to classify counties:

"In all counties which at the last federal census had a population of twenty-two thousand five hundred or more, and for which there is no provision made by law for the payment of the sheriff, he shall receive the following fees and compensation."

The sheriff is allowed in that twenty-five cents for service charged, or allowed at least what he has charged, and it is provided that that shall be paid out of the county treasury. Now, if that was a valid statute, the charge would be a proper one; but we are satisfied that it is unconstitutional and void,

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and the sheriff will have no recourse except under Section 1231, which provides that:

“The court of common pleas in each county shall make an allowance of not more than three hundred dollars, per annum, for the sheriff, for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided for, to be paid out of the county treasury.”

So we are compelled to hold that the judgment in the fourth and sixth causes of action was correct, but in the first being wrong, it will require a reversal of the entire judgment, unless counsel should prefer that it be modified and affirmed as modified.

Frank M. Moulton, for plaintiff in error.

Harry W. Miller, Prosecuting Attorney, for defendant in error.

TESTIMONY AS TO SPEED.

[Circuit Court of Hamilton County.]

THE CINCINNATI INTERURBAN COMPANY V. SAMUEL E. HAINES.

Decided, March 31, 1906.

Negligence—Speed of Interurban Car—Evidence—Charge of Court—Burden of Proof—Error—Res Gestae—Exclamation of Decedent at Time of the Accident.

1. While testimony as to speed is always more or less unsatisfactory, yet when the testimony offered on that subject was the best obtainable and was worthy of consideration, the finding of a jury made with reference thereto and in the light of the surrounding circumstances should not be disturbed.
2. A charge of court which dwells upon the subject of contributory negligence as an affirmative defense, when there was no such defense interposed, and is silent as to the burden of removing a suggestion of contributory negligence found in the plaintiff's own testimony, is so misleading as to require a reversal of the resulting verdict.
3. Inasmuch as it is impossible to state all the law in a single paragraph or a single special charge, reversible error can not be predicated upon the criticism of a special charge in this case in that regard.
4. Expressions or exclamations do not become a part of the *res gestae* unless they were automatic and involuntary, and involved no in-

tellectual processes or matter of inference or deduction; and an exclamation by the decedent an instant before the accident occurred is not competent as a part of the *res gestae*, where the same matter would not be admissible were the party still living and on the stand.

JELKE, P. J.; SWING, J., and GIFFEN, J., concur.

Taking up the grounds of error complained of in the order in which they are presented in the brief of counsel for plaintiff in error:

I. “(a). The plaintiff failed to show by a preponderance of the evidence that the defendant was guilty of negligence in the matter of speed.”

Testimony, as to speed, is always somewhat unsatisfactory. While it is a statement of fact, it necessarily involves matter of opinion. It usually must be expressed in various modifications of the adjectives “fast” and “slow,” and these expressions are correlative to surrounding facts and circumstances so that they furnish very little satisfactory information. Definite and exact statements and estimates as to speed are also unreliable, and are to be scanned with close scrutiny because most witnesses are incapable and unless there is some particular reason, qualified witnesses at the time are not usually making mathematical estimates of speed and particularly directing their attention and exerting their faculties in such determination. It is even then a matter into which error is very likely to creep. This being so, while the testimony on the subject of speed in the record is not of such satisfactory character as we usually look for to make out a preponderance on other clear cut issues of fact, yet it is evidence, the best obtainable and entitled to consideration, and the finding of a jury on this point made in the light of all surrounding facts and circumstances should not be disturbed. We are, therefore, unwilling to find error in this regard.

“(b). It is contended that the plaintiff failed to show by a preponderance of the evidence that the defendant was guilty of negligence in that the motorman was not maintaining a proper look-out ahead.”

If we take the record with all the evidence on this point admitted by the court below, we find no error in this regard.

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But our conclusion may be affected somewhat by what we decide later herein as to the admissibility of the exclamation of Mrs. Haines to her husband, immediately prior to the accident.

II. As to the charge of the court, relating to the burden of proof as contributory negligence, it appears that although in its amended answer the defendant company alleged that the death of Mrs. Haines was caused by the negligence and carelessness of her husband, Samuel E. Haines, at the trial the defendant rested at the close of plaintiff's testimony and offered no testimony on this point or any other. Whatever issue of contributory negligence there may have been herein must have arisen, therefore, on the plaintiff's own testimony. The charge of the court was as follows:

“Upon the question of contributory negligence or want of ordinary care upon the part of the plaintiff as I have stated it to you the burden of proof is upon the defendant who alleges the contributory negligence of the plaintiff, to prove such weight of the evidence just as the plaintiff must prove the negligence of the defendant alleged by him by the greater weight of the evidence, so the defendant alleging contributory negligence must prove such contributory negligence in the same way by the greater weight of the evidence.”

This is a charge on the subject of contributory negligence only as an affirmative defense, and says nothing whatever about the burden of proof of removing a suggestion of contributory negligence arising from the plaintiff's own testimony. We think, in view of the condition of the case at the time of its submission to the jury, this was error. It is contended that this is erroneous under the decision of *The Traction Co. v. Forrest*, 73 O. S., —.

The case at bar seems to us to be more aggravated than the *Forrest* case, because here the court not only charged as to the kind of contributory negligence that was not under submission to the jury, but failed to charge as to the only kind of contributory negligence that the jury could consider. This being so the charge in this regard was very misleading, and we think was error requiring reversal.

As to the third point, we think that the objection taken by counsel for plaintiff is good, but had we not determined to

reverse this case on other grounds, we would hardly find the use of the word "saw" here to constitute reversible error. Of course limiting the charge to the sense of sight, was erroneous, but we believe that a liberal construction might make this charge cover apprehension by all of the senses.

As to the fourth objection, finding fault with special charge No. 6, the criticism is one which applies to all special charges and can hardly be avoided. All the law on any point can hardly be stated in a single paragraph, nor in a single special charge. We find no reversible error in this regard.

V. We are of opinion that the court erred in admitting the testimony of plaintiff as to what his wife said shortly before the accident. Counsel for defendant in error very properly took their stand on the only defensible ground for admission of this testimony, viz.: that it was part of the *res gestae*. We think this is pressing the doctrine of *res gestae* too far. It would result in hear-say testimony of opinion of the decedent wife, as to what the motorman did or failed to do being given by the surviving interested plaintiff husband as to matter and under circumstances as to which it would be absolutely impossible for the defendant railroad to in any way verify or safe-guard itself. We think no case cited justifies the admission of this testimony. If the wife were living, and were upon the stand herself, she could not give this testimony. Taking words from the brief for counsel for defendant in error, and the authorities cited by them, expressions to be part of the *res gestae* must be automatic, involuntary, and must not involve intellectual processes and matters of inference and deduction.

VI. We find no reversible error in that part of the bill of exceptions where the court permitted a witness to testify as to the difficulty of seeing a vehicle at a reasonable distance.

VII. Having determined to reverse the case on the *second* and *fifth* grounds, there is no occasion for us to express any opinion as to the amount of the verdict.

Judgment will be reversed and cause remanded for a new trial.

Ellis G. Kinkcad and *H. Kenneth Rogers*, for plaintiff in error.

Peck, Shaffer & Peck and *Samuel B. Hammel*, for defendant in error.

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**THE EXERCISE OF EMINENT DOMAIN BY A FOREIGN
TELEPHONE COMPANY.**

[Circuit Court of Putnam County.]

**CENTRAL UNION TELEPHONE CO. V. VILLAGE OF COLUMBUS
GROVE.**

Decided, 1905.

*Eminent Domain—Pleading and Proof Necessary to Support Assump-
tion of—Foreign Telephone Company may Exercise Right of,
When—Provisions of Charter—Statutory Enactments.*

1. The right of eminent domain, involving as it does an attribute of sovereignty and an interference with private rights, must always be strictly construed; and the petition of a private corporation, claiming the right to exercise this power, must clearly set forth the grounds upon which its claims rest, and these allegations must be clearly proved.
2. In the absence of statutory provisions expressly conferring the right of eminent domain upon foreign corporations, interstate comity does not require that this right be extended to a foreign telephone company and there is no inherent power vested in such a company to condemn private property for purely local purposes and not as a part of an interstate system.
3. In a condemnation proceeding brought by a foreign telephone company, the petition must allege, not only that the petitioner is a corporation of its home state, duly created for the purpose of erecting and maintaining lines of telephone within such state, but also that by its charter it is empowered to appropriate private property therein; and in the absence of such averments the petition is bad on demurrer.

VOLLRATH, J.; NORRIS, J., and HURIN, J., concur.

Error to Putnam Common Pleas Court.

The plaintiff filed its petition in the Probate Court of Putnam County averring corporate capacity in the following language:

“The plaintiff, the Central Union Telephone Company, respectfully represents that it is a corporation duly created, organized, and existing under the laws of the state of Illinois, for the purpose of constructing, erecting, operating and maintaining lines of telephone and telephone exchanges within and without

said state of Illinois, and that it has likewise been duly authorized and empowered to construct, erect, operate and maintain lines of telephone and telephone exchanges within the state of Ohio, in accordance with the statutes of the state of Ohio, and it is so constructing, erecting, operating and maintaining lines of telephone and telephone exchanges in many cities and villages in said state of Ohio at this time.

“That by the statutes of said state of Ohio your petitioner, the plaintiff herein, is given and granted the right to use the lands authorized to be appropriated to the use of telephone companies, which lands are subject to the easement of streets, alleys, public ways, or other public uses within the limits of any city, or village, in said state of Ohio, and especially the right to use the land subjected to the easement of the streets, alleys, public ways or other public uses, within the incorporated village of Columbus Grove, Putnam county, Ohio, said village of Columbus Grove being a municipal corporation, organized and existing under the laws of the state of Ohio, located in the county of Putnam, in the said state, and being of the class of municipal corporations termed ‘villages,’ by the laws of the said state of Ohio, by entering thereon and therein, in accordance with the laws of said state of Ohio for the purpose of making preliminary surveys and using and occupying said streets, alleys, public ways, with poles, wires and other necessary appliances for the purpose of constructing, erecting, operating and maintaining lines, telephones and telephone exchanges.”

The plaintiff further alleges that in the establishment and conduct of its business it is necessary for it to use certain land within the village of Columbus Grove, subject to the easement of the streets, etc., of said village; that some time in July, 1903, plaintiff made application to the council of said village of Columbus Grove for an ordinance granting it the right to use said streets, etc., and presented a form of enactment to said council therefor; said council on September 21, 1903, rejected said ordinance, and that plaintiff and defendant are consequently unable to agree upon terms for such use although plaintiff claims to have made diligent effort to secure such agreement and that said council refuses to pass any ordinance as to the mode of use of said streets by plaintiff and that plaintiff is compelled, therefore, to apply to said court under authority of Section 3461, Revised Statutes, and ask that said court fix, determine and prescribe the mode of use of said streets, etc.,

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by plaintiff, so that plaintiff may be authorized to construct, operate and maintain its said line of exchange over said streets, alleys, etc. Plaintiff, therefore, prays that a proper summons issue out of said court to require defendant to be present at a date named therein and show cause to the court why a finding, order and decree should not be made in the premises and that plaintiff may be authorized and empowered to construct, erect, operate and maintain the telephone line, telephone exchange and toll line in said defendant village as by the statutes of Ohio provided, and for other and further relief.

To this petition the defendant filed its demurrer upon the grounds:

1. That the plaintiff has not the legal capacity to sue.
2. That the court had no jurisdiction of the subject-matter of the action.
3. That the petition does not state facts sufficient to constitute a cause of action.

Upon a hearing in the probate court, the demurrer was sustained as to the first and third grounds. Error was prosecuted in the Court of Common Pleas of Putnam County, and upon a hearing in that court the judgment of the probate court was affirmed. Error is now prosecuted here to reverse said judgment of the court of common pleas.

The error, if any, in this case, arises from the action of the court in sustaining said demurrer and this presents several very interesting questions. As indicated in the petition, the plaintiff is an Illinois corporation and it seeks by the proceeding in the probate court to exercise the right of eminent domain in a municipality in the state of Ohio. This is attempted under Section 3461, Revised Statutes, which reads as follows:

“When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to

incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.”

The “company” mentioned in the above section is defined in Section 3454, Revised Statutes, which reads as follows:

“A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road.”

By the terms of Section 3471, Revised Statutes, the provisions of the sections above named also apply to telephone companies.

It is claimed, however, that notwithstanding the sections cited, a foreign corporation may not exercise the right of eminent domain in this state, unless the right be expressly conferred by statute, and that the provisions cited not being, by express terms, made applicable to foreign corporations, they apply merely to local companies. It is claimed that this view is sustained by the act of our Legislature as expressed in Section 3399, Revised Statutes, expressly giving the right of eminent domain to railroad companies extending into, and through, this state even though foreign corporations. It is argued that the fact of such enactment but emphasizes the proposition that without it the railroad company could not exercise such right, and, therefore, as there is no similar section with reference to telephone companies, the latter also may not exercise this right.

In the case of *State v. Sherman*, 22 Ohio St., 411, 434, it is held that the policy of this state has been, and is, not only to permit, but to invite and encourage, ownership of railroads in this state by foreign companies on an equal footing with domestic companies. It was stated that to invite their co-operation in works of great public concern and then to discriminate against them in point of right to use and enjoy their right to property in the state would not only be unjust to them but unwise for the state.

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“If any discrimination does exist,” saith the court, “it is in regard to the power of condemning and appropriating private property to the use of the roads. In this case we find what we construe to be an express grant of that power. The Pennsylvania act incorporating the defendants [the Pittsburgh, Ft. Wayne & Chicago Railroad Company] gives them power to condemn and appropriate private property,” etc.

It will be noted that while in the above opinion the court places foreign and domestic corporations upon the same basis in all other matters so far as ownership and use of property is concerned, yet while it does not expressly deny, yet it does not concede to foreign corporations the right of eminent domain in this state where it is not expressly conferred. In the case, *State v. Sherman, supra*, the Legislature of Pennsylvania had empowered the defendant company to appropriate private property, and it was held by the court that in view of the provisions of Section 3399, Revised Statutes, above quoted, this power could be exercised by them in this state. This, however, does not answer the question with reference to the plaintiff in this case. There is no express law giving to foreign telephone companies the right of eminent domain in this state and especially for local purposes, and the right of eminent domain may not be presumed in favor of foreign corporations.

In the case of *Zanesville v. Telegraph & Tel. Co.*, 64 Ohio St., 67, 68, it is held that—

“Telephone companies organized under the laws of this state have the right, by virtue of Sections 3454, 3456-1 and 3471, Revised Statutes, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court made in pursuance of Section 3461.”

Here again it will be noticed that the right to invoke this law, to-wit, Section 3461, Revised Statutes, is limited by this case to telephone companies organized under the laws of this state.

While the court does not expressly deny the right to foreign corporations, yet this decision includes merely domestic corporations.

The same idea appears in the body of the decision, to-wit, on pages 88 and 89, it is stated:

“It is competent for the state, through its legislative department, to grant to telephone and telegraph companies organized under its authority, the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made.”

Here again the line is drawn just this side of foreign corporations and the court apparently made an extra effort to avoid including foreign corporations in its deliberation over the rights of a domestic corporation.

It is evident from the foregoing that, to say the least, the courts in this state have not only failed to recognize the right of eminent domain in foreign corporations, unless expressly provided by statute, but apparently indicate that the right, if not absolutely denied, is yet of doubtful propriety and an unsettled quantity. The right of eminent domain involving, as it does, an attribute of sovereignty and interfering with private rights, must always be strictly construed and is always subject to the closest scrutiny. Every assumption of this right, where not conferred by statutory enactment with the judicial notice of the court, must be clearly plead and as clearly proven. This has been repeatedly held by our Supreme Court. Moreover, it is held in the case of *Atkinson v. Railway*, 15 Ohio St., 21, that corporate existence and the right to exercise the power of eminent domain can only be derived from legislative enactment; and before a company can demand a judgment of condemnation, it must show that such powers have been conferred upon it by a valid law and that it has substantially complied with the condition which the law has annexed to the exercising of the power.

It is held in *Coppin v. Greenlees*, 38 Ohio St., 275, 279, that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this state, and by no court more emphatically than by this court.

In this connection it may not be amiss to call attention briefly to the matter of the power which plaintiff seeks to exercise in this case. As stated by our Supreme Court in *Giesy v. Railway*, 4 Ohio St., 308, 323:

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“The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the General Assembly in the general grant of legislative authority. It may be defined to be, the right of the sovereign without the consent of the owner, when necessary, to make private property ‘subservient to the public welfare.’

“It rests upon the public necessity (subordinates the rights of one to the welfare of all) and is just as broad as that necessity, and no broader.”

When, therefore, a private corporation claims the right to exercise such power, its claims must not only be clearly proven but its petition must just as clearly set forth the grounds upon which its claims rest and which it must prove in order to sustain them, else the petition is obnoxious to the demurrer.

In the case at bar, the petition, while averring that the plaintiff is an Illinois corporation, created for the purpose of constructing, erecting, operating and maintaining lines of telephone, etc., within and without said state of Illinois, yet nowhere declares that it is empowered by its charter to condemn and appropriate private property. This seems to have been the saving feature in the case of *State v. Sherman*, 22 Ohio St., 411. The Pennsylvania act incorporating the Pittsburg, Ft. Wayne & Chicago Railroad Company gave it power to condemn and appropriate private property. Nothing of this kind appears in the petition before us. We consider, therefore, that the petition is defective in this particular and that the demurrer was properly sustained.

The further averments in the petition that plaintiff is authorized by the laws of Ohio to appropriate streets, etc., is rather gratuitous than otherwise in view of the condition of the laws of our state. We have no law expressly conferring upon foreign telephone corporations the right of eminent domain. Moreover, while the question is, perhaps, not squarely before us at this time, yet we are of the opinion that even if the averment were properly made, that the plaintiff in this case has the right of eminent domain by the terms of its charter, yet it could not, under the condition of our laws at this juncture, exercise that right in this state in the case at bar. The purpose for which the use of the streets in question is sought is local in its scope.

It does not appear that the extension of lines, poles, etc., to be erected and constructed is part of an interstate transportation system or anything of the kind. It is simply a local telephone exchange. We do not think that the comity between states extends to cases where foreign corporations in this state seek to assume and exercise the attributes of sovereignty as against the private rights of the citizens of the state.

Holding these views, it is the judgment of this court that there is no error in the record before us and the judgment of the court of common pleas is, therefore, affirmed with costs.

Long & Kyle, for plaintiff in error.

Handy & Unverferth, for defendant in error.

LIABILITY FOR FALSE IMPRISONMENT.

[Circuit Court of Muskingum County.]

EDWARD L. TRACY v. EDWARD COFFEY.

Decided, October, 1905.

False Arrest and Imprisonment—Mistaken Identity—Arrest Made Without Warrant—Circumstances Rendering Officer Liable—Facts and not Appearances—Necessary to Justify Officer—Burden of Proof—Charge of Court.

1. A police officer who believes or has reasonable ground for believing that a felony has been committed may arrest a suspected person without a warrant; but should he discover that he has made a mistake in the identity of the prisoner, he should release him at once.
2. If the suspect refuses to submit to arrest and compels the officers to use force, he is guilty of resisting officers provided he is aware of their character as officers; and the question whether he knew they were officers, or believed he was being seized by persons with criminal intent or without authority to make an arrest, is one for the jury.
3. In an action for damages on account of false arrest and imprisonment, the burden is on the arresting officer to show that such a state of facts existed as justified him in making the arrest.

TAGGART, J.; DONAHUE, J., and MCCARTY, J., concur.

The action in which the judgment was rendered (now sought to be reversed) was one for causing the false arrest and imprisonment of the defendant in error.

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The record shows that the plaintiff below was a reputable citizen of the city of Zanesville, and on the evening of August 8, 1902, was going from the west side of the Muskingum river to the more central or business portion of the city. The evening was dark and stormy and the plaintiff had taken an unfrequented way to reach his destination.

The defendant below was the chief of police of the city of Zanesville and on the night in question he, in conjunction with two subordinate officers, were in search of two men, Stevens and Devine, who were charged with a homicide committed in Belmont county. One of the officers discovered Coffey and attempted to arrest him, but he resisted, and thereupon the other officer and Tracy came to the assistance of the officer with whom Coffey was struggling and overpowered Coffey and placed him under arrest. It was claimed by Coffey that the officers were in citizen's clothes and there was nothing to apprise him of their character. It was claimed by the officers that they informed him that they were officers, and that he was under arrest; that he continued his resistance until struck by Tracy and compelled to yield to superior force; that they believed him to be one of the persons for whom they were making search. The officers had no warrant to arrest Coffey or Devine or Stevens. After Coffey was struck by Tracy one of the officers recognized him, and informed Tracy that he is not one of the persons they were seeking and "that he is all right." Thereupon Tracy ordered his officers to take Coffey to the city prison and lock him up and "put a charge of suspicion against him or hold him until we can investigate him." After the lapse of an hour or two Tracy goes before the police judge and upon consultation with him files an affidavit charging Coffey with "*resisting an officer.*" The next day Coffey is released from prison by Tracy on the promise that he will return the day following and answer the charge of resisting an officer. There is a dispute as to what actually took place before the police judge when Coffey appeared, but Coffey was set at liberty without any fine or costs imposed or he was otherwise held or punished. There is no dispute in this record as to the following facts—

First. The officers were not seeking to arrest Coffey.

Second. The officers had no warrant to arrest any one.

Third. When the officers sought to arrest Coffey they were mistaken in the person of Coffey.

Fourth. During the melee, the identity of Coffey was discovered and his character as a peaceable citizen vouched for by the officer in the presence of Tracy.

Fifth. When the identity of Coffey was disclosed he was within the power of the officers and had surrendered.

Sixth. Thereafter Tracy ordered his officers to continue the detention and lock him up in the city prison.

Among the many errors set forth in the motion for a new trial and in the petition in error, the principal one is to the charge of court to the jury.

It is urged that the charge does not correctly instruct the jury on the rule of law in respect *to the appearances of the situation as viewed by the officers, and the reasonableness or probable causes which induced Tracy to adopt the course of conduct he did pursue*. That is, *if the appearances justified him and he acted in good faith and under an honest belief that Coffey was resisting an officer*, he had the legal right to arrest him without a warrant and detain him until a warrant could be obtained; and that charge failing to contain such instructions is misleading and erroneous.

It is to be observed that the plaintiff in error remained content with an exception to the charge as given; did not call the court's attention to the omission to charge the rule of law now claimed and made no request for further instructions in that regard. If the rule contended for was material or involved in the case, it was the duty of the party excepting to call the court's attention to the omission unless the jury was misled by the omission. *The Columbus Railway Co. v. Ritter*, 67 O. S., 53.

Was the charge as given misleading, and did the trial judge err in omitting such an instruction? The court in its charge defined false imprisonment as follows:

“False imprisonment consists of an unlawful detention by one person of another. It is a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without legal authority.”

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And further in the charge the court instructs the jury as follows:

“If the officers believed or had reasonable ground to believe that a felony had been committed and that Devine or Stevens had committed the crime and that Coffey was either Devine or Stevens, they had a legal right to arrest him without a warrant, although mistaken as to the identity of Coffey. But it was the duty of the officers to release Coffey on discovering their mistake.”

These instructions are justified by the following authorities:

An officer who has arrested a party without process or on void process can not detain him on valid process until he has restored such party to the condition he was in at the time of his arrest. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor, to use process for the purpose of continuing an imprisonment commenced without authority and by his wrongful act (6 H. L. Cases, 443; 50 N. Y., 669).

A person who has wrongfully arrested another without process or on a void process, can not detain him on a subsequent valid process until after he has been set at liberty (21 Barb., 99).

As to the right of the officers to further detain Coffey and require him to answer the charge of resisting an officer, we think the instructions to the jury were as favorable to the officer as he was entitled to. The court says—

“To constitute the offense of resistance of an officer, either under the state law or under an ordinance, the resistance or obstruction must be knowingly and willfully done. That is, if Coffey knew that the persons claiming to be officers, were officers and engaged in some official duty, and then knowingly and willfully violated either the state law or the ordinance of the city, and the officer, Tracy, found the plaintiff in the act of such violation, he could legally arrest him for such offense without a warrant and detain him for a reasonable time until a warrant could be obtained.”

The court thus submits to the jury the disputed question of fact whether Coffey knew the persons who were detaining him and their character, whether officers or foot-pads. If Coffey

knew they were officers, under this charge, he was guilty of resisting the officers and his detention was legal; if he did not know their character he was not guilty and he was not lawfully detained.

The burden of proving the legality of the detention was on the officer Tracy. He was required to show that such a state of *facts existed* as justified him in making the arrest, not that *the appearances of things* so justified him.

In the case of *Rinehart v. City*, 49 O. S., 257, the court says:

“In an action against the city by the party arrested to recover the money [deposited in lieu of bail] in which the legality of his arrest becomes a material issue, it was incumbent on the defendant to show that *such a state of facts existed* as justified the officer in making the arrest without the previous issue of a warrant and that he did not detain the party arrested an unreasonable time before obtaining a legal warrant.”

On page 266, Judge Dickman uses the following language:

“Where no affidavit charging the commission of an offense is filed with the magistrate and no warrant or process is issued for the apprehension of the person charged, it will not be presumed that an officer making an arrest acted under circumstances precluding the necessity of an affidavit and warrant. And in an action by the party arrested, in which the legality of such arrest is deemed a material issue in the case, it will not be incumbent upon him to establish that the officer *was not under the circumstances authorized* to arrest without warrant, but it will rather devolve upon those defending the officer *to show that such a state of facts existed* as justified the officer in making the arrest without the previous issue of a warrant and that he did not detain the arrested party an unreasonable length of time before obtaining a warrant.”

But it is not claimed that the detention and confinement was for the purpose of procuring a warrant for resisting an officer. All the parties to this transaction unite in saying that Coffey was held until the chief could “put a charge of suspicion against him,” which was subsequently changed to resisting an officer. He arrested him for committing a felony, under the mistake that he was either Devine or Stevens, and upon fully ascertaining that he had made a mistake he continues the arrest and

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locks him in prison to await a charge of "suspicion" and subsequently charges him with resisting an officer.

We think there was no place in the charge to the jury for such instructions. Had such a charge been given, it would have been erroneous, being a mere abstract statement and having no application to the facts in this case and not a correct statement of the law. We find no error in the charge of the court, and no errors in the record to the prejudice of the plaintiff in error, and the judgment is affirmed.

Winn & Bassett, for plaintiffs in error.

Andrews & George, for defendants in error.

CONVICTION IN PROBATE COURT UNDER BEAL LAW.

[Circuit Court of Miami County.]

WILLIAM OBERER V. THE STATE OF OHIO.

Decided, April 5, 1904.

Liquor Laws—Statute Giving Jurisdiction to Probate Court in Certain Counties not Unconstitutional—Error Proceedings to Common Pleas—Concurrent Jurisdiction—Services of Stenographer at Trial—Time—A Holiday Counts, When—Affidavit Charging Offense—Negating the Exception as to Regular Druggists—Sentence.

1. Section 6454, Revised Statutes, giving the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for lack of uniform operation.
2. Inasmuch as the rank of courts and the right of appeal is a matter regulated by statute, the fact of the concurrent jurisdiction of the probate and common pleas courts in certain matters does not require that an appeal from the probate court in any one of those matters should be to the circuit instead of the common pleas court.
3. Where no demand for a stenographer is made in a criminal trial, but a mere inquiry is made on behalf of the defendant as to whether one would be present, there is no prejudicial error in going to trial without a stenographer.
4. A holiday counts as one of the three days allowed for filing a motion for a new trial, unless the holiday is the last of the three days.
5. It is not necessary that the information, required under Section 6455 in prosecutions before the probate court, shall be sworn to, and the

preliminary affidavit is sufficient to carry the matter through all the courts.

6. Where an information charges both keeping a place open and selling, the exception of the statute is sufficiently negatived as to the first charge by stating that the place was "not a drug store," but is not negatived as to the second charge if it is not added that the accused is not "a regular druggist."
7. Section 7327 authorizes a commitment until fine and costs are paid; and if such were not the case, the right to complain would be waived by payment.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

Plaintiff in error was tried before the probate court for keeping open a saloon on Sunday, in violation of Section 4364-20, Revised Statutes, known as the Beal Law. He was found guilty and fined \$100 and costs, which amount was paid for him by his attorney, who forthwith prosecuted error to the common pleas court. The common pleas court affirmed the judgment of the probate court, and the case is here on proceeding in error to reverse the judgment of the common pleas. The points relied upon are—

1st. That the law giving jurisdiction to the Probate Court of Miami County (Section 6454, Revised Statutes), is unconstitutional because special legislation and in violation of Section 26, Article II, of the Constitution of Ohio.

This point, we think, is not well taken, because Section 8, Article IV, of the Constitution, provides that—

"The probate court shall have jurisdiction in probate and testamentary matters * * * and such other jurisdiction in any county or counties, as may be provided by law."

Within the limits of this authority, the Legislature has conferred upon the probate court in certain counties, including Miami, "concurrent jurisdiction with the court of common pleas in all misdemeanors and all proceedings to prevent crime." The offense here charged is certainly a misdemeanor.

But it is urged that even if the probate court has jurisdiction it is concurrent with the common pleas, and the common pleas therefore has no appellate jurisdiction, because "courts have no power to interfere with the judgment and decrees of other courts of concurrent jurisdiction," arguing that error

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must, therefore, be prosecuted directly to the circuit court, which would give the circuit court of this county jurisdiction different from that conferred in other counties.

This point is not well taken because, while it is true that of courts having concurrent jurisdiction, the one first obtaining jurisdiction of the parties retains it without interference by the other, yet the rank of courts and the right of appeal is regulated by statute, and Section 6708, Revised Statutes, gives the common pleas court the right to review the action of the probate court. It would hardly be contended that because a magistrate's court and the common pleas have concurrent jurisdiction in certain cases involving not more than \$300, the judgment of said magistrate could not, in such cases, be reviewed in the common pleas.

Again, it is claimed that the plaintiff in error was refused the services of a stenographer in the trial before the probate court, which deprived him of obtaining an accurate record of the proceedings and the means of prosecuting error thereon. The affidavit offered with reference to that matter is contradicted by the bill of exceptions, but taking the affidavit of plaintiff's attorney, as though uncontradicted, and a case of prejudicial error is not made out, because it appears that an inquiry only was made as to whether a stenographer would be present. There was no demand made for a stenographer, and no continuance asked on account of his or her absence, and no exceptions taken to being forced to trial under such circumstances. Plaintiff simply submitted, with a protest, to the situation and proceeded to trial.

Strictly speaking, however, we can not consider this matter before us. The motion for a new trial was not filed in time. The trial was on the 24th of November, 1903. The motion for a new trial was filed November 28th. An affidavit was filed by defendant's attorney setting up that the 26th was a national holiday, and that on the 27th he was engaged in another trial, and on account of illness in affiant's family he was prevented from filing the motion. This is not a sufficient excuse. A holiday counts unless it is the last day, and the excuse does not apply to all three days allowed by the statute.

Another error claimed is that no indictment was returned, and the information was not sworn to. Indictment is not necessary under Section 6455, and there is no requirement that the information be sworn to. Of course in original proceedings in criminal matters (other than by indictment) there must be an affidavit upon which to found a warrant. And that was the case here. In the preliminary proceedings before the mayor's court there was an affidavit, and that was sufficient to carry the matter all the way through.

Again, it is urged that the information was insufficient to charge the offense defined in Section 4364-20, because it does not properly negative the exception and set forth that the accused was "not a regular druggist." That exception applies only to the clause with reference to the *sale* of intoxicating liquors, and not to the offense of keeping open on Sunday a place where intoxicating liquors are usually sold. The information contains matters with reference to two charges, one of keeping open a place, etc., and the other of selling, etc. The first charge is sufficiently stated because it negatives the exception by stating that the said room was "not a drug store." The second charge does not state that the accused is not a regular druggist, and is defective. The latter charge, therefore, being insufficient, may be considered as surplusage, and the accused is deemed to have been convicted of the offense properly charged.

Lastly, it is claimed that the judgment of the probate court is erroneous in that it provides for the commitment of the plaintiff in error to jail until fine and costs are paid. Section 7327 authorizes such a sentence, but if not, it was waived by payment.

The judgment, therefore, of the common pleas court will be affirmed.

Robert J. Smith, for plaintiff in error.

A. B. Campbell and *William H. Gilbert*, for the state.

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ATTACHMENT IN ACTIONS FOR NECESSARIES.

[Circuit Court of Lucas County.]

JOE NEMIT v. JOHN VARGO.

Decided, April 6, 1906.

Demand in Writing Jurisdictional—Error Proceedings on Motion to Discharge Attachment—Costs—Meaning of the Word “Provided”—Section 6501, Relating to Proceedings as to Garnishee.

1. The circuit court has jurisdiction to review an order by the common pleas, made on appeal from the overruling by a justice of the peace of a motion to discharge an attachment.
2. A demand in writing upon a debtor for necessities, for the excess over ninety per cent. of his personal earnings, is a necessary condition to the issuing of an order for attachment. (*Hughes v. Shields*, 7 C. C.—N. S., 84, followed by a majority of the court. Judge Wildman adopts the contrary holding in *The K. B. Company v. Batie*, 2 C. C.—N. S., 358).

HAYNES, J.; PARKER, J., concurs in a separate opinion; WILDMAN, J., dissents in a separate opinion.

Vargo commenced a suit against Nemit for \$20.42 before a justice of the peace in Oregon township, and caused an attachment to issue. There was a garnishee proceeding against the National Malleable Castings Company, and the order of attachment was served upon that company. After that Nemit, by his attorney, came in and moved to discharge the attachment for sundry and divers reasons, among others that no demand in writing had been made upon the said defendant for ten per cent. of his earnings or for any other amount of his earnings, as required by law. It does not appear here that the garnishee answered, but the justice, having overruled the motion to discharge the attachment which was made by the defendant, the case was brought up by appeal to the court of common pleas, under the statute, and the court of common pleas refused to discharge the attachment and affirmed the action of the justice of the peace, and the case has been brought here on error.

The first point made by counsel for Vargo is that the matter having been taken to the court of common pleas by appeal, the

action of that court is final in the case, and that this court has no jurisdiction to hear the petition in error. Now, a part of Section 6494, under the head "How property discharged from attachment", reads—

"Provided, that in any case the defendant may make a motion before the justice of the peace to dissolve the attachment, or release the property, money, or credits attached, or garnisheed, either or both; which if overruled may be appealed by the defendant to the court of common pleas, if in session, or to a judge thereof in vacation, by giving notice to that effect to the justice of the peace, but no bond shall be required. Upon such notice of appeal being given, the justice of the peace shall forthwith transmit to the clerk of the court of common pleas all the original papers; and thereupon, within three days from such notice of appeal, or upon such further time as may be for good cause allowed, said court or judge shall hear and determine said motion in the same manner as though it was originally brought in said court of common pleas, and upon a final hearing said court or judge shall forthwith transmit the judgment with said original papers to said justice of the peace, which judgment shall be entered upon the docket of said justice of the peace as the final determination of said motion; and said attachment property, moneys and credits shall be disposed of as directed in said judgment."

Section 6709, Revised Statutes, provides:

"A judgment rendered or final order made by any court of common pleas, or a judgment thereof, may be reversed, vacated or modified by the circuit court of the county wherein such court of common pleas is located, for errors appearing upon the record. All errors assigned in the petition in error shall be passed upon by the court, and in every case where a judgment or order is reversed or remanded for a new trial or hearing, the circuit court shall, in its mandate to the court below, state the error or errors found in the record upon which the judgment is founded. This act shall apply to pending actions, prosecutions and proceedings."

Section 6707, Revised Statutes, provides what is a final order:

"An order affecting a substantial right in an action, when such order in effect determines action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after

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judgment, is a final order which may be vacated, modified or reversed, as provided in this title."

Now as long ago as the 5th Ohio State Report the Supreme Court decided that an order to discharge an attachment was a proceeding that might be taken up upon a petition in error, before final judgment in the case, and that has been the law ever since. And we have no doubt that this order of the court of common pleas may be reversed by this court, or affirmed by it; that is to say, we have jurisdiction to hear it and pass upon it, and, therefore, the motion which was made to quash the writ will be overruled.

Coming now to the merits of the case, the question which has been presented here is one on which the circuits of this state have been unable to agree, the Circuit Court at Cincinnati holding in one direction, and the Circuit Court of Cuyahoga County in another direction, they being the only circuit courts that have passed on the question so far as we have learned. It was said in argument that counsel are anxious to have this court pass upon the question so that the court of common pleas could be guided by this court. This court is divided on the subject. The majority of us have come to certain conclusions, and we hope that one of these parties will take the case to the Supreme Court and have a final decision that will be binding on all courts throughout the state.

Now, in this case, Mr. McLeary, acting as justice of the peace, received the following affidavit:

"I, Benjamin F. Mallett, make oath and say that I am the agent of the plaintiff in the above entitled action, and that the claim in this action is for an amount due for groceries and meat sold and delivered to the defendant at his request, and I also make oath that the said claim is just and that I verily believe plaintiff ought to recover thereon the sum of \$20.42; that the property about to be attached is not exempt from execution. I also make oath that the said claim is for necessities. I further say on my oath aforesaid that I have good reason to, and do believe, that the National Malleable Casting Company is indebted to said defendant and has property, moneys and rights in action of said defendant in its possession or under its control subject to be attached in this action."

The affidavit was made before him. Then was issued the order of attachment. The statute in regard to attachments before a justice of the peace commences at Section 6489:

“The plaintiff shall have an order of attachment against any property of the defendant (except as hereinafter provided) in a civil action before a justice of the peace, for the recovery of money, before or after the commencement thereof, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff’s claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and that the property sought to be attached is not exempt from execution, and, if the personal earnings of the defendant are sought to be attached, that the defendant is not the head or support of a family, and has not in good faith the maintenance and support of a widowed mother, wholly dependent upon him for support, or that such earnings are not for services rendered within three months before the commencement of this action, or, that being earned within that time, the same amount to more than one hundred and fifty dollars, and that only the excess over that amount is sought to be attached; or that the claim on which judgment is sought is for work or labor or for necessities; and except when the claim is for work, or labor, or for necessities; also the existence of some one or more of the following particulars: * * *. No attachment shall issue by virtue of this chapter against the personal earnings of any defendant for services rendered by such defendant within three months before the commencement of the action or the issuing of the attachment, unless the defendant is not the head or support of a family, or unless the amount of such earnings exceeds one hundred and fifty dollars, and then only as to the excess over that amount, or unless the claim is one for necessities, and then for only ten per centum of such personal earnings.”

The affidavit filed in this case does not set out these facts, but simply says there is property there not exempt from execution. Now, having proceeded that far, the chapter goes on as to the garnishee, and states that it shall bind the earnings due at the time of such services that shall become due from the time of service until the trial of such cause—

“Provided, however, that of the personal earnings now exempted under the provisions of Sections 5430, 5441, 5483 and 5548 of the Revised Statutes as amended April 26th, 1898, shall, in addition to the ten per centum for necessities” * * *.

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This clause also relates to the exemption of ninety per cent. of the earnings.

* * * “be further liable to the plaintiff for the actual costs of any proceeding brought to recover the same in any sum not exceeding four dollars, and such garnishee may pay to such debtor an amount equal to ninety per centum of such personal earnings, less the sum of four dollars for actual costs as herein provided, which shall be due at the time of the service of process, or which may become due after such service and before trial, and be released from any liability to such creditor.”

Now, down to 1894, that is the way the law stood. The statute allowed an attachment for necessities without filing affidavit of fraud, non-residence, etc., as allowed by the statute, Section 6849, but expressly declares that they shall only have the excess over and above the amount that the party has exempted from liability. That in this particular case would be ten per cent. of the earnings before he had his attachment, and when the garnishee paid the amount of ten per cent. of the earnings it was first applied to the four dollars of costs. In 1894 the statute was amended by adding the following clause:

“Provided further, that the person bringing an action for necessities shall first make a demand in writing for the excess over and above ninety per centum of the personal earnings of the debtor; and no costs or expense shall be chargeable to the defendant debtor in such action if he tender payment in money or duly accepted order for the excess of his personal earnings over and above ninety per centum thereof upon such written demand made therefor.”

There comes the stress of the case. Some courts, and one member of this court, are of the opinion that the attachment issued lawfully, but upon showing being made that no demand was made, that the costs shall not be charged against the debtor, and that was the opinion of the court below. That is the opinion of the Circuit Court of Cuyahoga County. On the other hand, the Circuit Court of Hamilton County held a contrary doctrine, and held that the attachment can not issue until the demand has been made, and of that opinion is a majority of this court.

The statute provides expressly that a person bringing an action for necessities shall first make a demand in writing for the excess over and above ninety per cent. of the earnings of the debtor, and he shall not be charged with any expenses if he makes payment or gives an accepted order for ten per cent. of his personal earnings. The majority of this court are of the opinion that that demand must first be made before the party has a right to issue his order of attachment. It would seem to be very proper to require that that should be set forth in the affidavit for the information of the court. But at any rate, it is agreed in this case that no demand was made, and that the order was issued. And holding this view of the case, the majority of the court are of the opinion that the court erred in refusing to dismiss the attachment. We think that that was a condition that was fixed by law precedent to his right to have an order of attachment issue, and that he should have followed the statute; and that there ought not to be an order of attachment issued and thereby compel the debtor to hire a lawyer to go in and try to make a defense. It seems to us that the clear view of the Legislature was that the demand must first be made as a condition to having that order of attachment issued, and holding this view an order has been made reversing the action of the court of common pleas.

PARKER, J.

We are all in accord upon one proposition, and that is that this statute is exceedingly hard of interpretation. There is not one of us quite sure we are right on any one point. It is true that in this language, "the person bringing an action for necessities shall first make a demand in writing for the excess over and above ninety per centum of the personal earnings of the debtor" before proceeding in an action; the term "action" is qualified by Judge Haynes to signify "such action", *i e.*, the special proceeding under consideration or treatment, and yet we think that the term "proceeding" having been used in the same section in a number of instances and the whole section dealing

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with a matter of reaching wages, otherwise exempt, by a special proceeding, in certain cases, that is, either by attachment or a proceeding in aid of execution, which is also contemplated here, we believe that we are authorized to conclude that the Legislature had such special proceedings in mind in the use of the word "action"—i. e., action of that character, though strictly, the word "action" applies to a civil action. I am not sure but the Circuit Court of Hamilton County has construed this statute as meaning that before the civil action for the money is instituted the demand must be made, but we are inclined to think that that is going rather farther than was intended by the Legislature. Because there is no provision in this statute as to what shall result from a failure of the plaintiff to make a demand, whereby opportunity may be given to the defendant to pay without suit and thus save himself costs; and provision being made for the result flowing from such demand, whether complied with or not, it seems to me that a failure to make such demand was not contemplated, but that it was contemplated that the demand would be made in all cases. It will be noted that the casting of the burden of costs upon the plaintiff where no demand is made is not expressly provided for in this statute at all, but in order to reach that result it is necessary to read something into the statute. In other words, it is necessary to read into the statute that if the creditor, shall fail to make demand before instituting the suit or before instituting the proceedings, that then the result shall be that he shall not collect this additional four dollars costs out of the ninety per cent. that the debtor might otherwise retain. It is apparent that it is just and proper that some such result should flow from his failing to make the demand, but if we rely upon the letter of the statute the creditor could avoid this result and could require the debtor to pay this additional four dollars costs by simply failing to make any demand. The results, we repeat, flowing from the making of the demand if complied with, and flowing from the making of the demand if not complied with are provided for in the statute; but a result to flow from the failure to make any demand at all, as I read the statute, is not expressly provided for. Certain of the courts have read into the statute, or have so construed the

statute, as that the result of failing to make the demand shall be a failure to maintain the special proceedings; holding that the demand in writing is a condition precedent to the institution of the suit, just as the demand upon a tenant in forcible detainer to vacate the premises is a condition precedent to the institution of the suit, and just as the demand upon a claim against an administrator before suit is begun is a condition precedent to the institution of the suit, and other illustrations might be mentioned.

This provision as to the demand follows the word "provided," and is in a clause which starts out with the word "provided." It is true that ordinarily a clause starting out with this word is a proviso intended to qualify in some respect that which has gone before—it does not stand as an independent provision—but I think a careful reading of this whole section will show that the framer of it did not use the word "provided" in that technical sense, because it occurs several times in the course of this statute and in some cases it can not be regarded as a clause qualifying that which has preceded, but it is the introductory word of independent provisions when the conjunction "and" would have served the same purpose. I shall not take time to read the statute to illustrate this and it would take some time to discuss the section fully under this head, but upon reading it, it will be seen that the word "provided" occurs four or five times in the course of the section at the beginning of sentences, and that it is certainly not in all cases used in the technical sense of the introduction of a proviso qualifying what has preceded it. I concur with Judge Haynes in his conclusion.

WILDMAN, J. (dissenting):

Upon the first question involved raised by the motion to quash service, as it is in form, although perhaps it should be a motion to dismiss the proceeding in error, I am in accord with the majority of the court. I think that neither a motion to quash service nor a motion to dismiss the proceeding in error should prevail upon the grounds urged in argument, or any other that occur to me.

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I desire, however, to offer a few words in explanation of my dissent from the conclusion arrived at by a majority of the court, which conclusion has led to the reversal of the judgment of the court below. The construction of Section 6501, Revised Statutes, is one of much difficulty. The question is a close one, and it is not surprising that courts and attorneys differ in their views. I do not think that it is clearly provided by this statute, as Judge Haynes holds, that before bringing an action for necessities, even if property is attached in the proceeding, there must be, to give the court jurisdiction, a preliminary demand for ten per cent. of the earnings sought to be attached.

An examination of this statute discloses that it is simply a modification of previous enactments in Sections 5430, 5441, 5483 and 5548 of the Revised Statutes. Without stopping to read those sections it is enough to say that they also provide for the subjecting of ten per cent. of the earnings of the debtor to the payment of his debt for necessities, but there is no provision in those sections that any portion of the ninety per cent. remaining may be applied to the payment of costs in the suit in which the attachment was obtained. The Legislature, apparently recognizing that much of the benefit of the provision in favor of a creditor suing for necessities by reason of the giving to him of ten per cent of the earnings would be unavailable to him if he were required to pay the costs of the proceeding out of his own pocket, provided by this Section 6501 that the debtor in addition to his liability for the ten per cent. should be further liable to the plaintiff for the actual costs of any proceeding brought to recover the same in any sum not to exceed four dollars, the Legislature carefully guarding the interests of the debtor by fixing the maximum costs which might be so taken out of his ninety per cent., and then added this language:

“And such garnishee may pay to such debtor an amount equal to ninety per centum of such personal earnings, less the sum of four dollars for actual costs as herein provided, which shall be due at the time of the service of process or which may become due after such service and before trial, and be released from any liability to such creditor.”

That is, as has been provided in the sections before, the garnishee may pay over to the debtor ninety per cent., leaving only the ten per cent. to be applied, and he would then be exonerated from any further liability to the creditor by reason of having released all the earnings excepting the ten per cent. But the law in Section 6501 qualifies that by permitting the paying of the costs, to the maximum amount of four dollars, from the ninety per cent., and then adds: "Provided further, that the person bringing an action for necessities shall first make a demand in writing for the excess over and above ninety per centum of the personal earnings of the debtor." In other words, the garnishee shall be so exonerated from liability provided that the creditor has first made this demand.

I think that there is no provision in this statute that before the beginning of an action the creditor shall make a demand. That would be something of an anomaly in our law. In other words, it would seem absurd to make a provision that a person suing for the price of necessities must make a demand before instituting suit in order to give the court jurisdiction, when a person suing for any other thing need make no demand in order to give the court such jurisdiction. Now, to avoid this absurdity the majority of the court, as I understand their position, think that there should be read into this statute, and there is no other way of avoiding it, some language after the words "bringing an action," so as to make it express the idea that it is considering only the case of a person bringing an action for necessities in which he seeks to subject earnings or ten per cent. of the earnings of his debtor by attachment; but that language is not found in the statute, and the construction for which I contend requires no interpolation.

My impression is that the office of a proviso in a statute is to qualify that which goes before. Here is an enactment, not that the creditor *shall* make a demand before suit; but that the garnishee may be exonerated from liability provided that the demand is first made. It is a provision that the enactment of the section immediately preceding shall be operative in case of such demand and then, in order to make the matter more

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clear, the statute proceeds to provide that even if the demand is made, no cost or expense shall be chargeable to the defendant debtor if he tender, in the way provided, the amount of the excess over ninety per cent. of his personal earnings.

I think that the court below was right in the construction which it placed upon the statute, and in holding that a demand was not essential to give the court jurisdiction, of either the action for necessities or the attachment proceeding. I am disposed to follow the judgment of the Cuyahoga Circuit Court, consisting of Judges Winch, Hale and Marvin, rather than that of the Circuit Court of Hamilton County. For convenience, reference may be made as supporting the view of the majority of the court to the case in 12 O. D., 438, a decision of the Clarke County Common Pleas, and the case referred to in Hamilton county found in 7 C. C.—N. S., 84. The decision of the Cuyahoga Circuit Court, holding that the demand is not essential to confer jurisdiction, is reported in 2 C. C.—N. S.; 358.

I do not know that I care to add anything to what I have already said except perhaps that the provision as to notice in a forcible detainer suit is based altogether upon a different statute and one where the phraseology is so dissimilar to that employed here that it seems to me it can have no application. I think that this whole section, which is amendatory of the original Section 6501, has especial reference to the matter of costs, permitting the same to be taken from the ninety per cent., with the limitation that the maximum amount thereof shall not exceed four dollars. It seems clear to me that that was what was in the mind of the enactors of the section. It does not occur to me that the treatment of the clause relating to demand as a mere proviso or qualification of what precedes it, is a technical construction. It appears to me to be the natural one, and the other construction, which is maintained by a majority of the court, to be the one more difficult to sustain and one requiring, as I have already suggested, a change in the phraseology of the statute.

Potter & Potter, for plaintiff in error.

C. H. Durand, for defendant in error.

PROCEEDINGS IN AID OF EXECUTION.

[Circuit Court of Lake County.]

WESLEY SWEET v. W. C. BARNUM & CO.

Decided, January Term, 1906.

Necessaries—When the Exemption May be Claimed—Parol Evidence Admissible—To Show Its Character before being Merged into Judgment.

Under proceedings in aid of execution it may be shown by parol evidence that the claim upon which the judgment was rendered was for necessities, and ten per cent. of the earnings of the judgment debtor subjected to the payment of the claim of the judgment creditor.

Brief of Elbert F. Blakley, attorney for plaintiff in error:

When judgment is rendered on a claim or demand the claim or demand itself no longer exists but merges in the judgment. The original claim has by being sued upon and merged in the judgment lost its vitality and expended its force and effect. Black on Judgments, Vol. 2, Section 674; Freeman on Judgments, Section 215.

Parol evidence is not admissible to show that a judgment was founded upon matters not presented by the pleadings. Black on Judgments, Vol. 2, Section 626.

The legal effect of a judgment can not be varied by proof, outside the record. *Woolworth v. Wrinker*, 11 O. S., p. 593, at pp. 596, 597; *Sargent v. Sargent*, 8 N. P., p. 238; s. c. 11 Dec., p. 218.

A claim for necessities reduced to judgment can not be basis of proceedings in aid of execution under ten per cent. law. *Roller v. Esman*, * 15 Dec., 579; Ohio Law Bulletin No. 24, June 12, 1905; *Salisbury v. House*, 15 Dec., 584; Ohio Law Bulletin No. 24, June 12, 1905; *Brown v. West*, 73 Me., 23; *Uran v. Houdlette*, 36 Me., 15; *Bicknell v. Trickey*, 34 Me., 273; *Bangs v. Watson*, 75 Mass. (9 Gray), 211.

See following sections of Revised Statutes: 6489, 6501, 6680-1, and 5430.

*Reversed, *Esman v. Roller*, 3 O. L. R., 116.

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Brief of R. G. Shepherd, attorney for defendant in error:

The question as to whether certain goods sold are "necessaries" is one to be decided after the original judgment of the justice is entered; it is one involving the remedy and can not be determined in the original action. The questions that could have been determined and which were determined in the action on the account were (1) is the defendant indebted to plaintiff; and if so (2) for how much. The default judgment rendered under favor of Section 6577, O. R. S., decided in the affirmative of both of those questions and on those alone. To have pleaded in the bill of particulars that the goods were necessities would have been pleading a conclusion of law and would have anticipated a defense available only under proceedings in aid of execution. The proper time for the debtor to claim his exemptions is when the officer is about to levy (*Scars v. Hanks*, 14 O. S., 298); it is the privilege of the debtor, not the duty of the justice, to claim exemptions (*Kcmpe & Sons v. Ravens*, 68 O. S., 113, at 125). Section 6257, O. R. S., provides what shall be alleged in the bill of particulars. *Constable & Co. v. White*, 1 Handy, 44.

The words "claim, debt or demand" found in Sections 5430-6 and 5441, O. R. S., can not be construed to mean or to refer to the judgment on the account. This original judgment did not by its recitals estop Barnum & Co., from showing in proceedings in aid of execution, that the goods sold were necessities, because where a judgment is relied upon by way of estoppel the question is not what the court might have decided, but what it actually did decide (*Porter v. Wagner*, 36 O. S., 471; *Shirland v. Bank*, 21 N. W., 200). The original judgment shows that Sweet was indebted to Barnum & Co. in a certain sum and that is all that it shows. Inasmuch as the bill of particulars alleged nothing about necessities, how could the judgment show the questions not raised in the pleadings? *R. R. v. Hutchins*, 37 O. S., 282.

The questions at issue in the proceedings in aid of execution arose at a time when new parties had intervened, when different rights had arisen and at a time subsequent to the rendition of the judgment on the account, and hence it was in the nature of a separate action founded and dependent upon the judgment in the original action.

When the proceedings in aid of execution were instituted under favor of Section 6680-1 *et seq.*, it brought the parties into the same relation as though garnishment proceedings had been instituted (21 O. Cir. Ct., 434, *Kerrush v. Myers*); and Sweet, having filed in the proceedings in aid, his counter affidavit denying that the goods were necessities and that ten per cent. of his wages were liable to the payment of the account, Barnum & Co. should have been allowed to show that the statements made in the counter affidavit were not true, and that the claim, debt or demand was for necessities. *Kirk v. Stephenson*, 59 O. S., 556; *Coston v. Paige*, 9 O. S., 397; *Bradley v. Wacker*, 13 Cir. Ct. Rep., 530.

The introduction of this evidence would not have varied the terms of the original judgment on the account, as the proceedings were a separate and distinct action. *Harrison v. King*, 9 O. S., 388; *Young v. Gerdes*, 42 O. S., 102; *Burkham v. Cooper*, 2 Cir. Ct. Rep., 77; *Trout v. Marvin*, 2 C. C.—N. S., 523; *Barbour v. Boyce*, 5 Nisi Prius Rep., 273.

The provision of the statute making ten per cent. of the personal earnings of a debtor liable to seizure for a "claim, debt or demand for necessities" (O. R. S., 5430-6 and 5441) can not be construed to mean that the words "claim, debt or demand" are identical with or refer to the judgment on the account; the judgment is the mere evidence of the debt (*Latham v. Balke*, 18 Pac. Rep., 150); a judgment of a court is a finding upon certain facts proved, while a debt, claim or demand is the result of certain acts of the parties to the action.

The defendant in error, therefore, claims that it should have been allowed to show in the proceedings in aid of execution the nature of the goods sold and delivered for the sole purpose of determining the question as to whether or not they were necessities.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Barnum & Company filed a bill of particulars against Wesley Sweet before a justice of the peace of this county, claiming that there was a certain amount due them on account of goods sold

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and delivered. The claim as a matter of fact was for necessities, but it was not so stated in the bill of particulars. Sweet made no defense and judgment was obtained by default for the full amount against him.

Some time afterwards Barnum & Company commenced proceedings against Sweet under the statute in aid of execution and alleged in their affidavit that the Baltimore & Ohio Railroad Company was indebted to Sweet for wages and sought to have ten per cent. of such wages appropriated to the payment of their claim upon which the judgment was obtained, averring in their affidavit that the claim was for necessities furnished Sweet.

Sweet filed a motion to dismiss the proceeding upon the ground that Barnum having filed a bill of particulars averring that his claim was upon an account for goods sold and delivered, and taken judgment upon the same, they can not in the proceeding in aid of execution set up that the claim was for necessities.

The justice of the peace sustained the motion of Sweet and dismissed the proceeding. Error was taken to the common pleas court; that court reversed the judgment of the justice; set the case down for trial; rendered judgment ordering the Baltimore & Ohio Railroad Company to pay ten per cent. of the wages due Sweet into court to be applied upon the judgment of Barnum & Company, and the case is now before this court upon error to reverse that judgment.

The claim of plaintiff in error before us, as it was below, is that the claim of Barnum & Company in the proceeding in aid of execution is upon a judgment rendered upon a bill of particulars upon an account for goods sold and delivered, and is in no way a claim for necessities. The claim of plaintiff in error is two-fold. First, that parol evidence can not be introduced to explain the bill of particulars, and second, that the judgment of the court merged the claim, whatever it was, into the judgment, and that a judgment is not a claim for necessities.

The defense, to say the least, is ingenious and what is more has the support of judges of two common pleas courts of the state, for whom we have the highest respect, and also would seem to have the support of the courts of the highest resort of several

of the states. *Roller v. Esman*, Common Pleas Court of Hamilton County, *Weekly Law Bulletin*, June 12, 1905; *Salisbury v. House*, Common Pleas Court of Montgomery County, *Weekly Law Bulletin*, June 12, 1905; *Brown v. West*, 73 Me., 23; *Bangs v. Watson*, 75 Mass. (9 Gray), 211.

We think the difficulty arises from a proper construction of Section 5430 of the Revised Statutes respecting the words "claim, debt or demand." When we take all the sections of the statute together, it is apparent that these words are not restricted to the claim, debt or demand upon which the proceeding in aid of execution was based, but upon the claim, debt or demand which went into the judgment.

There is no doubt but what the original claim is usually merged into the judgment and for most purposes is wiped out by the judgment.

"The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment and decree. It is drowned in the judgment and must henceforth be regarded as *functus officio*." Freeman on Judgments, Section 215.

That is true of the judgment when the judgment is involved, but the subjection of the property of a debtor to the payment of a claim is entirely different. Exemptions can not be claimed until the property is sought to be executed. Conditions then surrounding the parties alone are inquired into. The judgment has no force and effect save that the claim of the creditor is made certain, and it is necessary to permit execution, but as to what property is exempt depends upon the conditions pertaining at the time the debt is contracted and the execution is sought to be enforced. As against many claims no exemptions are allowed at all, although judgments are rendered upon the claim. Judgments upon mechanics' liens, under the liquor laws, for taxes, and many others that might be mentioned.

It seems to us that what is denominated in Section 5441 by "claim, debt or demand for the payment of which it is sought

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to subject such personal earnings is one for necessities furnished to the debtor, his wife or family; then only ninety per centum of such personal earnings of the debtor shall be exempt," means the original claim, debt or demand. Any other interpretation would make the provision wholly ineffective. No execution could be issued until judgment is obtained; no action upon the judgment could be instituted until judgment was obtained; no proceeding in aid of execution could be instituted until judgment, and indeed no order can be made in attachment in favor of the creditor as to disposition of property or the turning over to him the amount claimed due from garnishee under Section 6501 upon which so much reliance is placed until judgment is obtained, and if after judgment and before order as to the claim garnished, the debtor interposes that the judgment merges the original claim and the judgment is not for necessities, the creditor is entirely foiled in his attachment proceedings; of course, if he does not or can not proceed in attachment, he is entirely remediless as to the ten per centum provision. Such a holding as contended for by plaintiff in error would make the provision of the statutes wholly nugatory and the action of the Legislature wholly inconsistent with its design.

Having seen that under our statute the judgment does not so merge the claim as to preclude the showing as to what it consisted of, it necessarily follows that it may be done by parol.

The theory that we adopt is fully sustained by the Supreme Court of Rhode Island in *Thompson v. Roach*, 6 Atlantic Rep., 790. The syllabus of that case is:

"Pub. St. R. I. 209, Section 4, cl. 12, exempts from attachment wages not exceeding \$10, except when the cause of action is for necessities. Upon action in debt upon judgment recovered against defendant in action in assumpsit for necessities—*Held*: That the cause of action is as much for necessities in the action in debt upon the judgment as in the action in assumpsit."

Judgment of court of common pleas affirmed.

Elbert F. Blakely, for plaintiff in error.

R. G. Shepherd, for defendant in error.

FEES COLLECTED BY MUNICIPAL OFFICERS IN STATE CASES.

[Circuit Court of Scioto County.]

THE CITY OF PORTSMOUTH V. CREAD MILSTEAD; AND THE CITY
OF PORTSMOUTH V. JAMES A. BAUCUS.

Decided, May, 1906.

Mayors and Chiefs of Police—Fees Earned by, in State Cases—Not Recoverable by the Municipality—Uncertainty as to Authority to Delegate Control Over—Strict Limitation of Municipal Powers.

1. The provisions of Section 1536-633 (known as Section 126 of the Municipal Code) requiring "that all fees pertaining to any office shall be paid into the city treasury" has reference to municipal fees solely, or such fees as may be fixed by municipal authority.
2. Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, *Quære?*

JONES, J.; WALTERS, J., and CHERRINGTON, J., concur.

Error to Scioto County Common Pleas Court.

In the common pleas court, the city of Portsmouth, whose corporate limits are co-extensive with Wayne township, brought an action against its former mayor, Cread Milstead, seeking to recover certain fees in criminal prosecutions known as state cases.

The amended petition contains three causes of action; the first seeking to recover fees drawn by the mayor from the county treasurer, the second for sums drawn and collected from the common pleas court in felony cases, and the third for fees collected by him from defendants in cases of misdemeanor.

The amended petition alleges, as a basis of recovery, the passage of an ordinance whereby the city had fixed his salary as mayor in the sum of \$1,500 per annum, and provided in such ordinance that such salary should be "in full yearly payment for all the services rendered and duties performed by him in his official capacity as such mayor of the city, judge of the police court and ex-officio justice of the peace, and all fees received and collected by him as such official shall be paid into the city treasury weekly."

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In the second case, the action was brought against Baucus for fees of similar character, drawn by him as chief of police, and is otherwise similar to the former action, except that the ordinance in the latter case provides a salary of \$1,200 per annum in full yearly payment for services performed by him in his "official capacity as such chief and ex-officio constable, and all the fees heretofore pertaining to said office, i. e., that of city marshal, shall be paid weekly into the city treasury."

The common pleas court sustained a demurrer to the amended petition in each case.

Counsel for the mayor denies the power of the General Assembly to delegate to city councils the authority to legislate upon subjects that are non-municipal; it is insisted that municipal corporations may pass ordinances touching subjects only that are clearly of local and municipal character, but that fees in state cases not being of such character, the power of legislation and control thereof is reserved in the state.

The fees sought to be recovered by the city in the first and second causes of action were those levied by general taxation and paid out of the county and state treasuries respectively, and it would seem that this was an indirect method of recouping the city, from those treasuries, for the payment of salaries to its municipal officers.

This, together with the fact that fees and costs made in the performance of duties under state control and which are no part of the functions of city government might well raise the *quaere* whether such authority and control over fees in state criminal cases can be delegated to municipal councils. But whether it can be so delegated, it is not necessary for us to decide.

Assuming that such power of delegation does exist, then the question arises whether it has been conferred?

It is uniformly held that municipal powers are strictly limited. They have only these powers that are expressly granted or are clearly implied, as essential to carry into effect such powers expressly granted, and in cases of doubt, the doubt should be resolved against the city. *Ravenna v. Penn. Co.*, 45 O. S., 118, 121; *Bloom v. City of Xenia*, 32 O. S., 465.

It would seem that the framers of the ordinance in question doubted the purport of the act granting them authority to retain the fees of officers in state cases, for the terms of the ordinance manifestly widens the scope of the act.

Section 126 of the Municipal Code provides that—

“Council shall fix the salaries of all officers, clerks, employes of the city government, except as otherwise provided in this act, and, except as otherwise provided in this act, *all fees pertaining to any office* shall be paid into the city treasury.”

When the Legislature provided that all fees “pertaining to any office” shall be paid into the city treasury, did it intend more than the fees pertaining to the office of the mayor, and such as arose from duties purely municipal?

The city council, by the terms of its ordinance, resolved any doubt in its favor by broadening the scope of the act, and providing that his salary should be in full for all of the services and duties performed by him in his official capacity as mayor of the city, judge of the police court, and *ex-officio justice of the peace*, etc.

The general scope of the act of October 22, 1902, now commonly known as the Municipal Code, was for the sole purpose of providing for the organization of municipal corporations and conferring upon such clearly defined municipal powers and duties.

By Section 129 of the code the mayor has been constituted the chief conservator of the peace within the corporation; this section clothes him with municipal duties only; and it is fairly inferable that the Legislature, in revising the statutes giving him compensation, intended such compensation for municipal duties solely.

The state fixes and controls the amount and character of fees in state cases, and has delegated to municipal councils authority to fix the fees for violation of its municipal laws. The scheme of legislation recognizes the distinction between the jurisdiction, powers and duties of the mayor, and such as he exercises as an *ex-officio justice of the peace*.

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In addition to the municipal duties imposed upon the mayor by Section 129 of the Municipal Code, he is clothed by certain statutes, which were not incorporated in the act of October 22, 1902, with jurisdiction in felonies and other criminal proceedings, concurrent with justices of the peace throughout the county; and in certain classes of misdemeanors his jurisdiction is final and co-extensive with the county.

Under Revised Statutes, 1745, he "is entitled to receive the same fees that are or may be allowed justices of the peace for similar services."

This section has not been repealed by the Municipal Code, unless the blanket repealing clause effects its repeal by providing that "this act shall supersede all acts or parts of acts not herein expressly repealed which are inconsistent herewith." But Section 126 of the code is not necessarily inconsistent with Revised Statutes, 1745; or if doubt arises in the construction of these two sections, such doubt must be resolved against the delegation of power to the city.

It would seem, therefore, that Sections 126, 128 and 129 of the Municipal Code sought to deal only with municipal organizations, municipal duties and municipal fees; and that "all fees pertaining to any office," under the rule established in *Ravenna v. Penn. Co.*, *supra*, refers to municipal fees or such that may be fixed and controlled by municipal authority.

What has been said above applies to the case of the city against James A. Baucus, as chief of police, except that the chief of police is more strongly entrenched behind an ordinance which only required the fees "pertaining to said office, *i. e.*, *that of city marshal*, to be paid into the city treasury.

The court below properly sustained the demurrers to the several amended petitions, and in each case the judgment will be affirmed.

George M. Osborn, for plaintiffs in error.

Henry Bannon, for defendants in error.

**COMPROMISE AGREEMENT AS TO BREACH OF PROMISE
TO MARRY.**

[Circuit Court of Miami County.]

WILLIAM H. CONARD V. ALMIRA BARE.

Decided, April, 1904.

Accord and Satisfaction—And Accord without Satisfaction—Neither Party Bound by Such an Agreement—Until He has Yielded Some Right or Advantage.

An agreement of accord and satisfaction in full release of a promise of marriage is without binding force so long as it remains unexecuted, or so long as the party complaining of the failure to execute the agreement of accord is unable to show a surrender of anything or the loss of any right by reason of entering into the agreement.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

October 9, 1903, plaintiff and defendant executed the following:

“This agreement entered into this ninth day of October, 1903, between William H. Conard and Almira Bare, both of Miami county, Ohio, witnesseth:

“That whereas said parties have heretofore on or about February 15, 1903, entered into a contract of marriage, and on or about September 19, 1903, said Almira Bare did notify said William H. Conard that she refused to carry out said contract of marriage with him, by reason of which said William H. Conard claims to be injured in his feelings and property, etc., and the parties hereto having mutually agreed to the amount of compensation to be paid said William H. Conard for his damages sustained by reason of the breaking of said contract, in the sum of four thousand dollars, which sum is now paid or secured to be paid to said Conard, the receipt of which he hereby acknowledges, they herewith release each other from all obligations under said contract of marriage.

“Signed in duplicate this 9th day of October, 1903.

“WILLIAM H. CONARD.

“ALMIRA BARE.”

Almira's cash not being forthcoming to William, he brought this action on the above agreement for \$4,000, with interest

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from October 9th, 1903, alleging that said agreement on her part was "in consideration of a full release from *all consequences* of defendant's breach of a promise to marry plaintiff"; also alleging "that relying upon the verbal promise of defendant to immediately deliver to him four thousand dollars or its equivalent, he signed and delivered to her, the defendant, one of the aforesaid copies of their agreement, but that defendant had refused to pay him the said \$4,000 or any part thereof," etc.

Defendant demurred on the ground that the petition shows an "accord" but no satisfaction, and hence is not sufficient foundation for an action.

The common pleas court sustained the demurrer, and plaintiff not wishing to plead further, the petition was dismissed, and plaintiff prosecuted error to this court.

We are of the opinion that the demurrer was rightly sustained upon the authority of *Frost v. Johnson*, 8th Ohio, 393, and *Bloomer v. Cist*, 4 N. P., 411-415, as well as upon the general principle governing accord and satisfaction.

Nothing was done by either party to carry out the agreement. Of course plaintiff was not bound by it until defendant paid or tendered the money, and she was not bound until he had yielded some right or advantage. But he had given up nothing, not even the love letters of his late sweetheart. He was in *statu quo*. If he had brought suit and in consideration of the agreement had dismissed it, the situation would have been different. If, relying on the agreement, he had lost the right to sue within the statutory limit, he might probably bring this action. But he gave up nothing; lost nothing, except of course the affections of the defendant. His civil rights are the same as they were before the violation of the agreement, and he can sue for breach of the promise of marriage, the same as if nothing had occurred. It is, therefore, in our opinion a clear case of accord without satisfaction, and the judgment of the common pleas court is affirmed.

Robert J. Smith, for plaintiff.

A. F. Broomhall, for defendant.

LIABILITY OF SURETIES ON BOND OF AN OFFICIAL.

[Hamilton County Circuit Court.]

STATE, FOR USE OF, ETC., v. FRANK COTTLE, ADMINISTRATOR
ET AL.*

Decided, May 14, 1904.

*Office and Officer—Fiduciary Bonds—Liability of Sureties for Public
Officials—Acts Done Colore Officii—Rule Shielding Sureties Applied.*

The sureties on the bond of a public official are answerable only for the faithful performance by him of the duties devolving upon him by law, and not for malfeasance in the performance of duties not thus devolving upon him.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

The rule adopted by the board of education on May 31, 1887, was without authority and contrary to law. Hence it was beyond the pale of George R. Griffiths' official duties to receive the money as alleged in the petition.

We do not think this is a case of acts done *colore officii* because there were no other similar acts pertaining to his office prescribed by law.

It is different in this respect from levies made by constables and sheriffs on strangers' goods.

The contention made by Mr. Waite that there was a breach of duty in failing to order the person paying the money to pay the same to the treasurer, is entitled to some weight. There are two objections to this:

First. There was confusion created by the unlawful rule of May 31, 1887, made by the board, the relator herein, and

Second. This did not cause the loss; the loss was made by Griffiths unlawfully appropriating the money to his own use after it had improperly come into his hands.

Applying the principles *strictissimi juris* shielding sureties we think the court below did right in sustaining the demurrer to the third amended petition against said sureties.

Judgment affirmed.

Charles J. Hunt, for plaintiff in error.

Frank F. Dinsmore and Harrison & Aston, for the sureties.

*Affirming, *State, for use of, v. Cottle, Adm'r, et al*, 4 N. P.—N. S., 145; affirmed, *State, for use of, v. Griffith et al*, 74 Ohio State, —.

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"PENDING" PROCEEDINGS WITH REFERENCE TO STREET IMPROVEMENTS.

[Circuit Court of Lucas County.]

THE CITY OF TOLEDO v. DOLPHUS J. MARLOW ET AL.

Decided, March 10, 1906.

Street—Improvement of—Proceeding "Pending"—From Date of Adoption of Preliminary Resolution—Statute Governing the Proceeding—Section 79 Construed.

1. The several statutory steps required for the improvement of a street by pavement or sewer, constitute a "proceeding" within the meaning of Section 79, Revised Statutes.
2. The rate or amount of lawful assessment by a municipality for a street improvement, such as a pavement or sewer, upon benefited or abutting property, is governed by the statute in force at the beginning of the proceeding.
3. The adoption of the preliminary resolution declaring the necessity of a street improvement, such as a pavement or sewer, is, in the absence of a petition by property owners for the improvement, the beginning of a proceeding, which is thereafter "pending" within the meaning of Section 79, Revised Statutes, and unaffected, in respect to limitation of rate of assessment, by an amendatory act not expressly retroactive.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

This case presents the question whether the preliminary resolution for the improvement of a street is the beginning of a proceeding, within the meaning of Section 79 of the Revised Statutes, so as to leave a limitation upon the amount of the assessment for such improvement as established by an act in force at the time of the preliminary resolution but amended thereafter, unaffected by the amendment.

The case is one in error from the court of common pleas, which, upon the petition of the defendants, Marlow and others, enjoined the collection of such an assessment. A demurrer to the petition having been overruled in the court of common pleas and no amendment to the petition being made, the court rendered judgment upon the demurrer, making the injunction theretofore allowed, perpetual.

The improvements contemplated are of two characters: one for a sewer and another for the paving of certain streets. The preliminary resolutions as to both were prior to a certain amendatory act passed on the 21st day of April, 1904. Up to that time, under the Municipal Code, Section 53, as found on page 40 of the 96th Volume of the Session Laws, it was provided that in all cases of assessments the council shall limit the same to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation, any assessment or assessments for any or all purposes within a period of five years exceeding thirty-three per cent. of the tax value thereof.

On the 21st day of April, 1904, this act was amended so as to change the limitation from thirty-three per cent. of the tax value to thirty-three and a third per cent. of the actual value of the property as enhanced by the improvements contemplated. The amendatory act containing no provision that it should be applicable to pending proceedings; and the sole question before us, presented by this petition and demurrer, is whether this amendatory act and the change in the limitation of assessment, affects proceedings in which the preliminary resolutions were adopted by the council prior to the enactment of the amendment. As to the sewer improvement, both the preliminary resolution and the so-called improvement ordinance had been passed prior to April 21, 1904. As to the paving improvement, the preliminary resolution had been passed, but the other ordinances at that time required, had not been. The statute at that time, that is before April 21st, provided not only for a preliminary resolution as to the paving, but also for a sort of intermediate ordinance, then an improvement ordinance, and finally an assessment ordinance. And in this case, as to the paving improvement, the preliminary resolution only had been passed prior to April 21st. On the 25th of April, the so-called intermediate ordinance was passed, although the law requiring it was repealed by the amendatory act. I say "intermediate," because that is the term that has been adopted by counsel for convenience, and it may properly be used by the court in the same way.

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Section 79, Revised Statutes, provides that whenever a statute is repealed or amended, such repeal or amendment shall *in no manner* affect pending actions or prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings unless *so expressed*, nor shall any repeal or amendment affect causes of such actions, prosecutions or proceedings existing at the time of such amendment or repeal unless otherwise expressly provided in the amending or repealing act. Provisions similar to this are found in some of these municipal statutes. There is one in the Municipal Code, but for the purposes of our inquiry it is not necessary to consider any other provision of this character than that embodied in the section just referred to.

There is no dispute in the contentions of the counsel that thirty-three per cent. of the tax value is the limitation as to the sewer improvement. There is no dispute that if the same limitation applies to the street improvement, the property can not be assessed for both improvements beyond thirty-three per cent. of the tax value. The only question, as I have said, is whether the law in force at the time of the preliminary resolution for the street improvement, or that in force at the time of the subsequent proceedings, governs the rate of the assessments.

There is now no room for discussion whether these actions of the council are to be treated as "proceedings," within the terms of Section 79 of the statutes. They have been recognized as such repeatedly by our Supreme Court. Perhaps in one of the earlier cases, the question was raised whether these matters constituted "proceedings," within the meaning of the law; but that question was definitely determined and all controversy ended in one or more of the first adjudications on the subject.

But it is contended by counsel for the city that Section 79 has no application to the amounts of assessments, and that an amendatory statute changing the limitation will go into effect, and govern the assessments which may be made, although a preliminary resolution has been passed, notwithstanding a concession that as to the *mode* of proceeding the original statute will apply and the amendatory section not affect the proceedings in

that regard. Much reliance is placed by counsel for the city upon what are known as the *Seasongood* and *Shean* cases, to which some brief reference may be made. I will not tarry long upon the *Shean* case, which was decided by a lower court and affirmed without report by the Supreme Court, because it seems to us from a consideration of the case that its decision was influenced rather by principles of estoppel, than by a construction of this statute. Certain parties had petitioned for an improvement, and after an assessment had been changed, they still had an opportunity to withdraw the proceedings; it was substantially held that they were estopped by permitting the proceedings to go on from disputing the validity of the higher assessment.

The case of *Cincinnati v. Seasongood*, reported in the 46 Ohio St., 296, held in terms, as we read in the syllabus:

“A municipal corporation having through its proper boards and officials passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement upon the abutting property, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property.”

And it is largely upon this language and the ruling claimed to have been made thereby that the city relies for the prosecution of its claims in this case. An examination of the case shows that the question really arose between the limitation provided by law at the time when the assessment ordinance was passed and that in force when both the resolution for the improvement and the improvement ordinance were passed. In other words, the amendatory act in that case was after the improvement ordinance, and no different rate or limitation of assessment obtained between the time of the passage of the preliminary resolution and the passage of the improvement ordinance; so that to hold that the limitation of assessment in force at the time of the passage of the improvement ordinance would apply and govern, was equally to hold that the limitation in force at the time when the resolution was adopted, would apply, because it was the same limitation. The court held in that case,

however, that at the time of the passing of the resolution and the passage of the ordinance—and perhaps they rely more upon the passage of the ordinance than the adoption of the resolution—a vested right accrued to the property owners to be assessed upon the basis of the law in force at that time, and not on one that was enacted later. And upon the general principle that the Constitution prohibits the enactment of retroactive laws, they held that the Legislature had no power after the adoption of the improvement ordinance, to change the assessment. I read from page 303 of the decision:

“Under the constitutional prohibition, the General Assembly has no power to pass retroactive laws (Article II, Section 28). Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective or retroactive.” (Citing a number of earlier cases.)

The court bases its conclusions upon this principle, without regard to the provisions of Section 79 of the Revised Statutes as to the effect of an amendatory act. On page 306, the judge delivering the opinion uses this language, expressly disavowing any intention to pass upon the provision to which I have referred, Section 79, Revised Statutes:

“Entertaining as we do the opinion that the defendants in error acquired a vested right under the act in force at the time of the passage of the improvement ordinance, which, by virtue of the constitutional inhibition, could not be impaired or taken away by the subsequent amendment and repeal of the act, we deem it unnecessary to consider whether the various steps in council and before municipal board, with respect to a street improvement, constitute a pending proceeding within the meaning of Section 79 of the Revised Statutes, which could not be affected by such repeal or amendment of the law.”

They are not saying what would be the effect of Section 79 upon the improvement ordinance or upon the various steps in council and before the municipal board with respect to the street improvement; they are including them all in their category in making this query, and in leaving this question open for future consideration. And then it is added:

“But we may refer to the case of *Raymond v. Cleveland*, 42 Ohio St., 522, in which it is held, upon forcible reasoning, that the successive steps to make an assessment or re-assessment for a street improvement, constitute a proceeding within the following saving clause of Section 1539 of the Revised Statutes.”

This is a section which, as will be observed, is analogous to Section 79 of the Revised Statutes applicable to all amendatory or repealing acts of the Legislature. The language of Section 1539 of the Revised Statutes is quoted by the Supreme Court:

“No suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made.”

We are unable to see any substantial distinction between that provision in the act then in force, applied by the Supreme Court to the Seasongood case, and the general act remaining in force, Section 79, which is applicable not only to these municipal proceedings, but to all other proceedings, actions and prosecutions.

Referring to the case of *Raymond v. Cleveland*, 42 O. S., 522, cited approvingly in the Seasongood case, we have in the syllabus this language, after statement that proceedings were taken for the improvement, by the city council:

“*Held*: That the various steps in council and before the boards, with respect to such street improvement, constituted a proceeding, within the meaning of the above provision, and hence council was empowered to re-assess pursuant to the Municipal Code of 1869, Sections 551, 552.”

The reference was to the provision in the Revised Municipal Code of 1878 by which the general laws then in force were repealed, and which act contained the saving clause above quoted.

It was the original act passed before the amendment which provided that the special tax could be levied and assessed and re-assessed.

On page 529, the judge speaking for the court, says:

“Counsel for plaintiff in error contend that the provision has relation to vested and property rights, pending actions, proceedings in the nature of actions, and the like, and does not

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extend to or embrace the right to make such an assessment or re-assessment. But we are unwilling to place any such limitation upon the provision. It is remedial, and no violence is done to the language by holding that it preserves the right to make this re-assessment under the Municipal Code of 1869. With respect to vested rights no saving was necessary."

[Just as held in the other case to which I have referred, where the Supreme Court apply the constitutional provision which protects vested rights, by providing that the Legislature shall not pass retroactive laws.]

"If the word *proceeding*, where it occurred in statutes relating to practice, has in one or two instances received a construction which seemed to limit it to litigation in the nature of a suit, that affords no justification for giving to the word such restricted meaning where it occurs in a provision relating to matters *in fieri* under a municipal code. See *Lafferty v. Shiun*, 38 Ohio St., 46, and cases cited. We think the saving has peculiar reference to matters like that involved here."

A later case is *Cincinnati et al v. Davis et al*, 58 Ohio St., 225, decided in 1898, some time subsequent, I believe, to the holding in the Shean case and its affirmance without report by the Supreme Court. I read from the syllabus:

"Where a resolution, declaring the necessity of the improvement of an alley, is made by the proper board of a city, at the time a resolution is adopted, the subsequent amendment of the law, whereby the making of such improvements, as to alleys of a certain width, is conferred on another board, does not work a discontinuance of the pending proceeding, though it be of such an alley; and the improvement should be prosecuted to completion by the board that adopted the resolution, unless otherwise expressly provided in the amendment. *Cincinnati v. Scasongood*, 46 Ohio St., 296, distinguished."

On page 233, as part of the statement of facts, I read:

"By its resolution and the notices served on the property owners, the proceeding for the improvement of the alley named was commenced and the board of legislation acquired jurisdiction of the proceeding for the construction of the improvement."

And a little later on the page, we have this language:

“So that at the passage of the law, March 30, 1893, conferring on the board of administration the improvement of alleys of the width of twenty feet or less, the improvement was a pending proceeding.”

Here is a distinct expression by Judge Minshall, announcing the opinion, that the proceeding was pending at the time of the passage of the resolution declaring the necessity for the improvement. He says:

“The question then arises whether the assessments are void, because the ordinance to improve adopted June 20, 1893, was adopted by the board of legislation, instead of by the board of administration; or, whether, by the amendment of March 30, 1893, the proceeding did not abate for the want of jurisdiction, before which it was commenced, to make it? We think not. The act of March 30, 1893, contained no express provision making it apply to pending proceedings. Hence, as we think, this proceeding was not discontinued thereby, and the board of legislation was authorized under Section 79, Revised Statutes, to proceed with and complete the improvement as it did. This section relates to no particular subject of legislation. It relates to the operation of statutes in general.”

Further, on page 234, he says:

“The section as first adopted did not contain the second clause as to repeals or amendments affecting the remedy; but as there was a disposition to hold that it did not apply to such changes in the law, this clause was inserted, so that a repeal or amendment affecting the remedy should not apply to pending proceedings, ‘unless so expressed,’ so that the amendment of March 30, 1893, does not apply to this case, if it is within the provisions of the above section, whether it relates to the remedy or not, for the amendment contains no express provision to that effect.”

As already stated, the act of April 21, 1904, the amendatory act under consideration in the case at bar, contains no express provision that it shall be applicable to pending proceedings.

The court further says:

“There seems to be the same reason for applying the provisions of this section to a pending proceeding for the improvement of a road or street that there is for its application to a pending proceeding in the nature of a suit, where the change

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in the law simply applies to the mode of procedure. In either case it must be assumed that the proceeding was commenced with reference to the provisions of the existing law; and it is neither wise nor just, as a general rule, to disappoint the parties in this regard by a change of the law, and, as must frequently happen, after a considerable amount of costs and expenses have been incurred."

Now we have the two cases to which reference has been made: one holding that the Legislature has no power by an amendment to affect or change vested rights by reason of an inhibition in the Constitution of the state (and it may be remarked that this Section 79 of the Revised Statutes applies to vested causes of action, as well as to the form of action, as well to rights as to remedies); and the *Cincinnati v. Davis* case in which it is held that the statute applies to attempted changes in the remedy, in the method or mode of collecting assessments, or to making the improvements, establishing them, and providing for their construction.

In the argument before us, another case, that of *Commissioners v. Green*, 40 Ohio St., 318, was cited as substantially holding that proceedings of the council are not pending proceedings within the meaning of Section 79, Revised Statutes. But Judge Minshall in *Cincinnati v. Davis et al*, *supra*, says on page 235:

"In so far as *Commissioners v. Green*, 40 Ohio St., 318, conflicts with this view it is not approved. In *Raymond v. Cleveland*, 42 Ohio St., 522, a more correct view is taken of a clause similar to the provisions in Section 79, Revised Statutes."

It will be recalled that the judge in that case quoted a section of the Revised Statutes, applying to the case which he was considering, which in my comment upon it, I have said was not to be distinguished in substance from Section 79, Revised Statutes, applicable to all legislation amendatory in its character. The judge rendering the opinion in *Cincinnati v. Davis* speaks of the act referred to in the 42d Ohio St. as similar in its provisions to Section 79. Reference is made by Judge Minshall on page 236 to both the *Seasongood* and *Shean* cases upon which so much reliance is placed by counsel for the city. He says:

"But it is claimed, however, that the case of *Seasongood v. Cincinnati*, 46 Ohio St., 292, requires a different ruling. We do

not think so. There, after the adoption of the ordinance to improve, a change was made, not in the mode of procedure but in the measure of assessment that might be made on the lots of such owners as abutted lengthwise on the improvement. By the statute in force at the adoption of the ordinance such lots were to be assessed according to the average depth of lots in the neighborhood. By an amendment subsequent to the adoption of the ordinance, this reasonable provision was stricken out, and such lots were required to be assessed for the full number of feet they abutted on the improvement. It was claimed that these lots should be assessed according to the amendment. But the court, observing that the parties had acted with reference to the law in force at the time the improvement ordinance was adopted, held that the assessment should be made according to the statute then in force and not according to the subsequent amendment."

It will be recalled that in the proceeding considered in the *Seasongood* case, as I have already said, the amending statute intervened between the improvement ordinance and the assessing ordinance, and all that the court was called upon to decide was as to whether the amendatory law providing for a different limitation of assessment, would apply to an improvement which had already been provided for by both resolution and the preliminary ordinance for the improvement. The judge continues:

"The same view was taken in *Shean v. Cincinnati*, affirmed by this court, and reported by the trial judge in 25 Bul., 212. In this case the assessment was made according to the amended law, because it was in force at the adoption of the improvement ordinance, and the parties had an opportunity to terminate the proceeding before this ordinance was adopted, and, not having done so, are presumed to have assented to that mode of assessment."

Here was a case where the improvement was made upon petition of property owners and where they had some power over the proceeding; a proceeding which they might have terminated at any time when the mode or extent of the assessment was changed. Judge Minshall further says:

"Manifestly the case of *Seasongood v. Cincinnati* is not decisive of the question here. It, and the subsequent case, simply decide that the parties to a street improvement may put an end to it at any time before the improvement ordinance is made,

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and that no change can be made by statute in the rate of assessment fixed by statute at the time that ordinance was adopted. This, however, is not a determination that the board before which the proceeding was commenced had no jurisdiction of the improvement prior to that time, or that the proceeding was not a pending one. The parties to a suit may dismiss it at any time after the court has acquired jurisdiction by its commencement."

So, in the court of common pleas, a party may, long after a proceeding has become a pending one, dismiss it without prejudice to another action. Parties have a certain control over the proceedings, and the Supreme Court here is recognizing a like control in the petitioners for a public improvement.

But in the case at bar, we have no petitioners for the improvement. The proceeding takes its inception from the resolution of the council without any preliminary act or any invoking of the powers of the council by the people who are to be affected thereby. The judge continues:

"The right to dismiss does not imply that the court has no jurisdiction; in fact the power to dismiss implies that the court has acquired jurisdiction of the parties and the subject of the action. In the case before us the proceeding was not put an end to by the parties on the adoption of the act of March 30, 1893. On the contrary it progressed before the board of legislation until it was completed. And as the change in the law did not affect pending proceedings of the kind, the assessments made for the payment of the costs and expenses of the improvement are valid and can not be enjoined."

These assessments, it will be remembered, were made by the board which had jurisdiction before the amendatory act was passed.

Another case (*Alfred Squier v. Cincinnati*) decided by the Circuit Court of the First Circuit, and reported in 5 C. C. Rep., 400 (3 O. C. D., 196), is perhaps more clearly in point upon the controversy now before us than any of these adjudications in the Supreme Court. The recital of facts shows that H, the owner of lots abutting on an avenue in the city of Cincinnati, while in Denver, Colorado, on March 11, 1887, signed a petition to the board of public affairs, asking in the usual form for an improvement of said avenue in a certain manner, and a like

petition signed by more than three-fourths of the owners of property abutting on such avenue had prior thereto, on the 14th day of January, 1887, been presented to such board; and on its recommendation the council of such city had prior to the 11th day of March, 1887, passed a resolution declaring it necessary to improve said avenue in accordance with the prayer of such petitioners. A few days after March 11, 1887, the petition of H was left at the office of said board and placed with the other papers relating to the improvement. Afterwards, namely, on May 13, 1887, the council, on recommendation of the board passed an ordinance providing for the improvement. On August 3, 1888, the assessing ordinance was passed. On September 30, 1887, nearly a year before the assessing ordinance was passed, H conveyed his lot to S, the plaintiff, who had no knowledge of the signing of the petition of H. The assessment on these lots was for more than twenty-five per cent. of their value, and one of them was a corner lot, and if the assessment was to be governed by the law in force prior to March 11, 1887, it should have been assessed for only 41.34 feet, instead of 135 feet as was done. *Held:*

“1. That H having signed the petition for the improvement which in effect waived the benefit of the twenty-five per cent. provision which he otherwise might have claimed, and such petition having been placed with the papers in the case, before the board recommended the passage of the ordinance to improve, it should be presumed that the board acted on the faith thereof, and the subsequent grantee of H can not have the benefit of such twenty-five per cent. provision.

“2. Such petitions having been filed and acted upon by the board and council prior to March 11, 1887, this initiated a proceeding for such improvement, and the section of the statute regulating assessments having been amended March 11, 1887, such amendment under the provision of Section 79, Revised Statute, did not affect such pending proceeding, but the assessment on such corner lot should have been made in conformity with the provisions of the section as it stood prior to March 11, 1887, at the time of the improvement ordinance.”

At the bottom of page 401 and on page 402, Judge Smith says:

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“The assessment on each of the lots exceeds twenty-five per cent. of the value thereof. The question is, whether the excess of the assessment over twenty-five per cent. of the value should be enjoined.”

And near the bottom of 402, and following along on 403, we have this language:

“Under the decision of the Supreme Court in *Cincinnati v. Seasongood*, 46 Ohio St., 296, the general principle is laid down that the assessment to pay for a street improvement must be under, and be governed by, the law in force at the time of the passage of the improvement ordinance. As the improvement ordinance in this case was passed on May 13, 1887, which was after the taking effect of the law of March 11, 1887, it would follow that the assessment would be under this law, unless Section 79, Revised Statutes, changes the rule. This section provides that ‘whether a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed.’ If this act of March 11, 1887, relates merely to the remedy, it is manifest that it does not in any way, express or implied, provide that it shall apply to pending proceedings.”

It is the judgment of this court upon both principle and authority that from the adoption of the preliminary resolution for the paving improvement mentioned in this petition, the proceeding was a pending one and that, as the act of April 21, 1904, contained no express provision that it should have application to pending proceedings, the limitation of assessments existing at the time of the amendatory enactment, is the limitation which should apply to these improvements; that the owners can not be assessed to pay beyond that limitation, to-wit, thirty-three per cent. of the tax value of the property, and we so hold.

It is our view that the court of common pleas did not err in overruling the demurrer to the petition, and the judgment of the court of common pleas will, therefore, be affirmed at the costs of the plaintiff in error.

C. S. Northup, City Solicitor; Orion W. Nelson, for plaintiff in error.

F. J. Flagg, M. S. Dodd, for defendant in error.

**DEMURRAGE WHERE GOODS WERE PURCHASED AFTER
ARRIVAL.**

[Circuit Court of Hamilton County.]

**THE CINCINNATI & COLUMBUS TRACTION COMPANY, v. THE
NORFOLK & WESTERN RAILWAY COMPANY.**

Decided, June 2, 1906.

*Bill of Lading—Ownership of Goods Covered by—Transfer of Title
After Arrival—Implied Agreement to Pay Demurrage with Other
Charges—Pleading—Contracts—Railways.*

1. While a bill of lading does not provide that demurrage for the detention of the car shall be paid by the consignee or his assignee, yet an assignee by delivering the bill of lading to the railway company and accepting the goods becomes bound by an implied promise to pay all specified charges.
2. In an action for recovery of demurrage, a defendant assignee of the consignee can plead only such rights as were possessed by the consignee, and a denial by him of any promise to pay the demurrage, in so far as it is a denial of an implied promise, must be treated as a mere conclusion.

GIFFEN, J.; JELKE, J., concurs; SWING, J., not sitting.

This action was commenced to recover certain charges for delay in unloading seventeen cars of steel rails after forty-eight hours' notice of their arrival.

Plaintiff railway company avers in its petition that the defendant traction company ordered the rails to be shipped to it at Hillsboro, Ohio, by the Carnegie Steel Company; that by the terms of the bill of lading, the shipments made were deliverable to the order of the Carnegie Steel Company upon the surrender of the bill of lading properly indorsed; that each bill contained the provision: "The delivering carrier may make a reasonable charge per day for the detention of any vessel or car and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder and hold said property subject to a lien therefor"; that the plaintiff complied with its said contracts, and notified the defendant of the arrival of each car,

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and held the same for forty-eight hours thereafter for unloading by the defendant; but that the defendant failed to unload each of said seventeen cars during the forty-eight hour period after receipt of notice of the arrival of each of said cars, and to return the same to the plaintiff; and each of said cars was detained by the defendant and the track of plaintiff was used for the storage of each of said cars, and for the time set forth it made a reasonable charge of one dollar per day for the detention of each car, amounting in all to the sum of \$1,139, which the defendant agreed to pay

The first defense of the answer is a general denial. The second defense denies that the defendant was the owner of the rails or that the same were delivered to or accepted by them during the period for which the charges were made. It avers that the rails were shipped by the Carnegie Steel Company to its own order and not to the defendant; that the Carnegie Steel Company was the owner and in possession of the rails, and this defendant had no possession nor control over the same. The defendant further avers that by a subsequent negotiation with the said Carnegie Steel Company, it became the owner of said rails, and said rails were delivered to the defendant, and freight therefor paid, but the defendant says that they were not received under the railroad receipt or bill of lading mentioned, but were received and accepted solely under said subsequent contract, and possession was delivered to them solely because the said rails were then in the possession of the plaintiff on its line in proximity to the line of this defendant, and this defendant never promised to pay said demurrage.

By way of cross-petition, the defendant seeks to recover the sum of \$422 paid as demurrage for the detention of certain car loads of steel rails which it avers were owned, in possession of, and under the control of the Carnegie Steel Company, and that it paid the charges demanded under protest.

The court sustained a demurrer to the second defense, and also a demurrer to the cross-petition. The defendant, not desiring to plead further, withdrew its first defense, and thereupon the court dismissed its cross-petition and rendered judgment for the plaintiff.

It is claimed the court erred in sustaining the demurrers for the reason that there was no contract, expressed or implied, whereby the defendant company became liable to pay charges for delay in unloading the cars not occasioned by itself.

The bills of lading expressly provide for a reasonable charge for the detention of any car after the same has been held for forty-eight hours for unloading, and while it does not provide that the same shall be paid by the consignee or its assignee, yet by delivering the bills of lading indorsed to it and accepting the rails, it impliedly agreed to pay all charges specified in the bills of lading. The company by delivering the freight may have surrendered its right to a lien just as it could surrender its right for freight charges, but did not surrender its right to collect the same.

The averment that the rails were not received under the bill of lading, but were received solely under the contract with the Carnegie Steel Company, can not be true, in view of the allegations of the petition under which the bills of lading properly endorsed must have been surrendered to the railway company; and besides, if received and accepted solely under the contract with the Carnegie Steel Company, the defendant acquired only such rights as that company had without in any way affecting the rights of the plaintiff. The reason given for the delivery of the rails to the defendant is without merit, as the payment of the freight or the right to collect the same is a more substantial reason than the mere convenience of unloading seventeen cars of rails without regard to their true ownership. The averment that the defendant never promised to pay must be construed to be a denial of any express promise to pay, and so far as it is a denial of an implied promise, must be treated as a mere conclusion.

We are of opinion therefore that the second defense is not good and that the demurrer to the same was properly sustained. Substantially the same question is involved in the demurrer to the cross-petition, which was also properly sustained.

Judgment affirmed.

C. B. Matthews, for plaintiff.

Hollister & Hollister, contra.

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**NEGLIGENCE AS BETWEEN RAILWAY ENGINEER AND
TOWERMAN.**

[Circuit Court of Lucas County.]

**THE LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY
V. JOHN BURTSCHER.**

Decided, October 7, 1905.

Principals, Vice-Principals, Superior Servants and Fellow-Servants—Duties, Authority and Discretion of a Towerman—To Some Extent Analagous to those of a Vice Yardmaster or Train Dispatcher—Whether a Superior or Fellow-Servant of an Engineer a Mixed Question which Should Go to the Jury, When—But Becomes a Question for the Court, When—Con-Association and Separate Department Principle—Negligence and Contributory Negligence—Railway Signals—Verdict of \$13,500 for Disabled Engineer.

1. Whether or not, under the circumstances of this case, a towerman was negligent in giving the signal which he did give, was a proper question for the jury.
2. Where there is a conflict of evidence as to custom in the moving of trains, it can not be said the jury found there existed a custom which exonerated the towerman of negligence, where it was equally possible under the testimony to have found that it was his negligence in the giving of signals which caused the accident.
3. The con-association rule has not been adopted in Ohio, and the separate department principle only to a limited extent and in such a manner that it is interwoven with the superior servant doctrine.
4. While in certain cases it may be a question of law and entirely for the court to determine as to whether the negligent employe was the superior of the injured one, the rule is still in force in Ohio that the question whether one servant is the superior of another should be determined by the evidence presented in each case.
5. Within a limited area the duties of a towerman are analagous to those of a train dispatcher, and under the current of authority he stands in the position of superior of an engineer; and where the negligence charged by an injured engineer was in the signals given by the towerman, a verdict supporting that contention will not be disturbed on the ground that they were fellow-servants.
6. The fact that the negligence of the engineer of the second engine in the collision contributed to the accident, would not relieve the railway company from liability to the injured engineer of the first

engine, where the primary cause of the accident was the negligence of the towerman.

7. A verdict of \$13,500 for injuries of a disabling character to a locomotive engineer in the prime of life, though perhaps larger than the judges of the reviewing court would have named, does not under the circumstances of this case indicate passion or prejudice on the part of the jury, or any such error in computation as would require a remittitur.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding in error to reverse the judgment of the Court of Common Pleas of Lucas County, on a verdict in behalf of the plaintiff below in the amount of \$13,500. The record is very voluminous and a large part of the time of the court has been occupied in its consideration. At the conclusion of the plaintiff's testimony, a motion was made by the defendant to arrest the testimony from the jury and direct a verdict, upon the ground that there was no actionable negligence shown against the company and the further ground that the negligence of the plaintiff himself contributed to the injury complained of. This motion was renewed by the defendant at the close of the introduction of the evidence. The motions were overruled by the court below, the case went to the jury, and the jury rendered the verdict which I have stated.

The substantial issues, as raised by the pleadings and receiving the attention of the parties on the trial were, first, whether one McGrevy, an employe of the defendant company, was the superior of Mr. Burtscher, the plaintiff; second, whether McGrevy was guilty of negligence directly causing the injury to the plaintiff; and, third, whether or not the plaintiff contributed to the injury by his own negligence.

This is the second time that this case has been brought to the attention of this court. I was not, on the other occasion, a member of the court as then constituted, and have had no familiarity with the case, except as I gather it from the present record and consultation with the other judges of the court, my associates. I will not attempt any elaborate review of the evidence bearing upon the two questions last mentioned, the claim of contributory negligence and the claim of negligence on the

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part of McGrevy. It is sufficient to say that after a very careful examination of the present record, which has required the reading of the whole of it, the court are unanimously of the opinion that there was a fair question of fact to be presented to the jury and considered by them upon each of these issues, the issue of claimed negligence of Mr. Grevy, the towerman, and the claim of contributory negligence of the plaintiff.

When the case was in this court before for review of the record, the case as then presented seemed to the circuit court to warrant the holding which was made, that the verdict of the jury was not justified by the evidence; that the disclosed facts showed contributory negligence on the part of the plaintiff and failed to show negligence of the defendant company through its servant, McGrevy. There seems to have been a substantial change in the evidence, not necessarily a contradiction, but a supplementing, a supplying of facts necessary to a better comprehension of the conditions existing at the time of the accident to Burtscher.

Counsel and parties in the case are so familiar with the general facts that it is not necessary, perhaps, that a review of them be given. The statement in the opinion of Judge Parker upon the former hearing would suffice to make the present one intelligible; but it is perhaps well to say that Burtscher was injured while in the employ of the company as an engineer; that he was at the time engaged in taking a train of cars off upon certain of the tracks in the Toledo yard, which have been variously designated in the record here, and which may be described as principally consisting of main or other tracks, but including also a track known as a cross-over and certain side-tracks. He had come into the yard for the night, and in passing over this cross-over track to one of the side-tracks, where it was intended to leave the train for the night, by the mistake of the switchman, and whose mistake it is not important to ascertain, the train started to go upon a track which it was not intended to occupy, whereupon the conductor instructed the engineer to back out. The engine was at the eastward end of the train—the train had been moving to the west; the tender

of the engine was toward the east, so that the engine was backing when the engineer proceeded to obey the order of his conductor, and in backing he proceeded upon the cross-over track, or was about to proceed on it toward what is known as the west-bound track of the two main tracks that have been mentioned. Some distance to the east, McGrevy, the other employe hereinbefore mentioned, was engaged as a towerman, having some charge of the tracks or trains as they came into the yard, and the giving of various signals, by semaphore or by lights, and perhaps in some other ways, a matter to which I will invite attention later.

As the train on which Burtscher was engineer had either began to back or was about to back, an incoming train from the east signaled for the switch by whistle, and the towerman thereupon changed the switch lights from red to white. At the time when the train on which Burtscher was engineer had passed into the yard he had been given the red signal and, as he claims, the signals remained red at the time he began to back, which, if a fact, as testified to by several witnesses, would justify him in the free use of the yard for switching purposes before passing upon this cross-over track.

An important question which arose upon the former hearing, and which has also arisen upon this, was as to the precise location and direction of movements of the train on which Burtscher was the engineer at the time when the signal was changed from red to white, and it is upon this point that the testimony seems much clearer to the minds of the court than upon the former trial. Burtscher testifies positively that at the time when he began to back, the red lights were still showing. He claims that he did not see the white light at all, and indeed, if he began to back while the red light was still showing, it is reasonable to suppose that as he proceeded in an angling direction across the track the thrust of the tank attached to his engine, and which, as I have said, was to the eastward of the engine, would obstruct his view of the switch light. The first intimation he had of any danger came from his fireman, who called out some words of warning.

Upon the change of the lights by the towerman, the engineer in charge of the engine attached to the train approaching from the east proceeded on his course; he was at first proceeding with considerable speed, that speed was slackened until, as he claims, I believe, his engine had come practically to a stop, perhaps to a full stop at the time when the two trains collided.

When Burtscher discovered that it was impossible to avoid a collision, having taken all the precautions that were in his power for the stopping of his train, he attempted to escape through the cab window, and in doing so he received the injury of which he complains.

It is the view of the court upon the evidence as now presented, taking the testimony of Burtscher that his train was in motion, that he had begun to back before the white light was thrown against him, corroborated as we believe it is by the result of a careful examination of the relative speed of the two trains and their location, that it is improbable that Burtscher's train moved the entire distance from the point where it had stopped when the conductor gave the order to back to the point of the collision, after the white light was thrown; and we think that the jury were justified in coming to the conclusion, as they probably did, that the white light was thrown after Burtscher had begun to back. If this is true, without any further consideration of the question, it would seem to relieve Burtscher of any charge of contributory negligence. And upon precisely the same condition, and because of the same fact, the situation is changed as regards the conduct of the towerman himself. The towerman's testimony upon the other trial was not altogether clear that the white light was thrown before the backing began. Upon the present trial it was very vague and uncertain. He does not know whether Burtscher's train was moving or standing still at the time when the white light was thrown. He knew this, that Burtscher's train had come into the yard and that as long as the red light was showing that Burtscher had the right to use this cross-over track to the fullest extent. Under these circumstances, we think it became a fair question whether the towerman was not negligent in throwing the white light so

as to permit the progress of the train from the east. He threw the white light; whether he was negligent or not is not a question for the court. We have no disposition to invade the province of the jury; and we do not conclude that the finding of the jury in this respect is so clearly against the evidence as to warrant a reversal.

More emphasis was placed by counsel in argument upon the remaining question, and that is the question as to whether or not the towerman stood toward Burtscher in such a relation as to make the company liable for the towerman's negligence; or whether he was merely a fellow-servant.

Upon the former hearing, the judge announcing the opinion of the court suggested that this was a mixed question, one which ought to be permitted to go to the jury; that is, the determination whether the towerman had any authority over Burtscher; and to that opinion we are still disposed to adhere.

It was argued, going back for a moment, by counsel for the plaintiff in error, that Burtscher had testified, and it was the theory of Burtscher's counsel below, that even if the white light was thrown before he began to back, and if he knew that the white light was showing, he had a right to back as far to the eastward as a certain point which has been designated as the inner tower; and it is claimed in behalf of the plaintiff in error that if that be so, that the towerman, knowing of that custom, knew also of another incident to the custom, that the engineer of the incoming train, by virtue of the custom, would stop at the inner tower, would not come into the yard, would not come to the point where the collision occurred, so that Burtscher would be defeated in his claim of negligence of the towerman by the very theory that he was asserting, which would excuse himself or exonerate himself from any claim of negligence contributing to his injury.

But the trouble with that argument, as the court considers it, is that we do not know that the jury adopted this theory of Burtscher or of Burtscher's counsel. The jury were entitled to a consideration of all of the evidence in the case, whether offered by the plaintiff or defendant. They were entitled to

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consider all the theories argued, and peradventure the jury may have failed to find that the custom was as claimed by Burtscher's counsel or by Burtscher. There was a conflict of evidence upon that point; it was no means a settled and undisputed proposition; so that the jury may well have found that there was no such custom; or they may have failed to find there was such a custom; and they may have based their verdict upon the other point, to which I have called attention, that the white light was not in fact shown until after Burtscher and his train had begun the eastward movement; and they may have found that it was the negligence of the towerman then to change the lights.

It may be said in passing that it is well settled by the adjudications, both in this state and of those elsewhere, that if the towerman was negligent, and if his relation was such to the company and to Burtscher as to make the company responsible for his negligence, if his negligence stood alone, without the negligence of any other employe concurring, that the responsibility of the company would not be lessened by the concurring negligence of some co-employe, some fellow-servant of Burtscher, as, for instance, engineer Fry of the westbound train; I need say nothing further on that point. If engineer Fry himself was guilty of negligence, and that negligence contributed to the unfortunate result, the injury of Burtscher, still the company would be relieved from any liability on account of the towerman's negligence.

Before glancing at the evidence, let me call attention to some of the principles which have been recognized by the various courts of the states. In the 12th Amer. & Eng. Ency. of Law (2d Ed.), page 946, is a paragraph in which this language appears:

“An important and universally accepted restriction of the fellow-servant rule is what is known as the ‘vice-principal limitation,’ which holds the master liable to one servant for the negligent performance by another of the personal duty which every master owes to his servants.

“The law imposes upon the master certain duties which concern the safety of his servants, and while he may, of course, delegate the duties to another one, his doing so in no wise affects

his responsibility for their proper performance. If one servant is injured by reason of the negligent performance of one of these duties by another servant, to whom it has been delegated by the master, the master can not escape liability on the ground that the negligence was that of a fellow-servant. In other words, where a servant is intrusted with the performance of one of the master's personal duties, he is, with respect to that duty, a vice-principal or representative of the master, who will be liable to another servant for the negligent performance by the vice-principal of the delegated personal duty to the same extent as for his own negligence."

On page 948, the text-writer distinguishes the relations of the vice-principal and superior-servant as follows:

"While the courts in some of the United States where the superior-servant limitation has been adopted, employ the term vice-principal as meaning a superior servant, this is neither the correct nor the common use of the term. There is a marked and very clear distinction between a superior-servant and a vice-principal. A superior-servant is, generally speaking, one who exercises the authority of direction and control over other servants and may or may not be charged with the performance of any of the master's personal duties. On the other hand, the status of a servant as a vice-principal, in the proper sense of the term, is in no wise dependent upon his rank or the grade of his employment; it depends solely and wholly upon the character of his duties. If he is charged with and is in the performance of one of the master's personal duties, a servant is a vice-principal, regardless of whether he occupies a position superior or inferior to that of other servants."

This rule or principle has not been very clearly elucidated perhaps in any decision in Ohio. As stated by this writer, there has been a confusion in the minds of many judges as to the distinction to be observed between a vice-principal and a superior-servant, and sometimes perhaps in some of the reasoning and dicta of the judges of our own Supreme Court there has not been kept clearly in mind this distinction. The doctrine of superior fellow-servant is essentially an Ohio doctrine, although it has been adopted in several other states. It has been repudiated in many.

There is another doctrine as to the liability of the employer to the employe for the negligence of fellow-servants, which has been held in some of the states, to-wit, that the company is not relieved from liability by the fact that a negligent employe is not a superior, is of the same grade perhaps of the one injured, provided he is in a separate department or branch of the service, so that in the work of the injured employe he is not brought into such close relations of association with the negligent one as to make it reasonably to be expected that he assumed the hazard of such negligence when he, himself, entered upon the duty. This principle has been especially recognized by the state of Illinois, and is the basis of the two decisions cited by counsel for the defendant in error here, rendered by the Illinois Supreme Court and Court of Appeals. I have those cases before me, but I will not stop to read them. It is really but one case that was carried from one court to the other (*The Chicago & Alton Railroad Company v. Wise*, 206 Ill. Rep., 433, and 106 Ill. App. Ct., 114). The reason for the citation of this case to the court is probably found in the fact that it is about the only case that counsel have been able to find involving the claim of negligence of a so-called "towerman," one like McGrevy, the employe in the case at bar, who was in charge of a tower, occupying it and having duties similar to those which were placed upon McGrevy. But the case has no application here for the reason which I have suggested, that it is based upon the con-association principle adopted and recognized by the Illinois courts. It is not held in the *Wise* case by the Illinois courts that a towerman was the superior of the trainman who was injured. But the court simply holds that he was not a fellow-servant, whose negligence was assumed by the injured one, for the reason that he was in a separate department or branch of the company's service; that is, that his relation was not so close to the injured man that it might be said that the injured man had assumed the hazard by working with him or near him, and therefore the company was held liable.

Our own Supreme Court, on the contrary, has not adopted the con-association rule. To a limited extent the separate depart-

ment principle has been recognized by our statute of 1890, and even there it is so interwoven with the superior-servant doctrine that it does not aid us in our present inquiry.

From an examination of the cases cited by the Century Digest and the various text-books to which we have any access, there seems to be almost an utter chaos or conflict of authorities as to the liability or non-liability of companies for the negligence of telegraph operators, train dispatchers, switchmen and persons in like employments, having some connection with the movement of trains whereby men upon the trains received injuries; but I think many of these cases may be reconciled or accounted for by the differences in the views of the different courts upon this con-association principle, this separate department principle, and I will not stop to review them.

The case of *Whaalan v. Mad River & Lake Erie R. R. Co.*, 8 Ohio St., 250, is the leading Ohio case along the line of the rejection of the con-association rule. I read from the syllabus as follows:

“Where a servant is injured in his person through the carelessness of a fellow-servant engaged in a common business and employment, and no relation of subordination or subjection existed between them, and the employer is himself guilty of no fault, such employer is not responsible for such injury.

“Where the injured party is engaged in the repair of a railroad track, which is then in use for the running of trains, and the party through whose negligence the injury occurs is a hand employed on the engine and tender of a passing train, they are engaged in a common business within the scope of the above rule.”

On page 255 Judge Brinkerhoff, speaking for the court, says:

“It has been suggested, however, that this case is to be excluded from the operation of the general rule, in respect to the liability of the employer for injury to a servant by the negligence of a fellow-servant in a common employment, on the ground that the servants here were engaged in different and distinct departments of duty, having no connection with each other; and this suggestion receives some countenance from the remarks of the judges *arguendo* delivering the opinion of the court in the Indiana cases above noticed.”

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[My impression is that Indiana afterwards repudiated this doctrine, but I will not state it positively without a little more critical examination than I have given to the cases.]

“For although in both these cases the court holds the plaintiffs to be, under the circumstances, passengers—and contend that their decisions may well be sustained on that ground—yet in their discussion of the questions involved, they argue that the fact of the plaintiffs being employed in different and distinct departments of duty, would relieve them of the application of the general rule, although they might not have been passengers. The validity of this argument we, in this case, are perhaps not called on either to affirm or deny, for, if we admit that there may be different departments of duty in the business, or a common employment so distinct from each other as to require an exception to be made to the application of the general rule, still we must hold, on the authority of well considered adjudications, that this is not a case to create such exception.

“Thus the case of *Farwell v. The Boston & Worcester R. R. Co.*, 45 Mass., 49, was an action against the company for an injury to the engineer of a locomotive, arising from the carelessness of a switch tender. It was held, notwithstanding the point was urged upon and received the particular attention of the court, that the plaintiff could not recover. But we are unable to see wherein the departments of duty of a fireman and of a track repairer are more distinct and independent of each other, than are those of an engineer and switch-tender.”

The court does not indicate in any way as to what sort of difference between the parties would be so wide as to bring them within the rule applying in other states. We might suppose, however, that the legal department, for instance, of a railway company was so distinct from the department operating its trains, in all its functions, all its duties, as to call for the application of the con-association rule, even in Ohio; but we have had no express illustration of the distinction which Judge Brinkerhoff by implication recognizes, *Whaalan v. Ry.*, *supra*.

The superior-servant doctrine, however, does obtain in Ohio, first finding recognition in the case of *The Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416, and in the case of *The Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Lewis*, 33 Ohio St., 196, the court holding, in substance, that the question as to whether one

servant is the superior of another is one to be determined by the evidence in each case. I think in *Ry. v. Margrat*, 51 O. S., 130, this latter principle is recognized. So far as I know there has been no rejection of this principle in later adjudications. It is true that if the facts are undisputed, it may become a question of law for the court, a question entirely for the court to determine, as to whether, in a particular case, the negligent employe was the superior of the injured one.

This brings me to an examination of some of the evidence, to determine just what the facts are here. This is a matter which was not passed upon at the former hearing in this court, and which it was not necessary to pass upon in the view then entertained by this court, in the case as then presented. In the testimony of the witness Mahony, found on page 26 of this record, in describing the duties of the towerman, he says:

“If he felt like letting a train come in on the north and south bound, it was his place to let them in, if he saw the tracks were clear.”

Whether this witness was right in this or not, that is his evidence, and the expression implies a certain amount of discretion on the part of the towerman as to letting the train come in even if he saw the track was clear.

On page 58, the witness Atkinson was examined. He had acted in various capacities for the Lake Shore Company, as switchman, pony conductor and yardmaster at different times, and he says he was familiar with the construction of the tracks in the vicinity of this tower in the year 1901, the time of this injury. He testifies on page 60 in answer to this question:

“Q. What, if any, notice was the towerman accustomed to have before letting in such train? A. Why, he used to have an order if everything was all clear and all right, for to let them come ahead.

“Q. From what source? A. From the yardmaster, or some of the assistant yardmasters or something like that.”

Now, on the occasion in question there was no direct instruction given to the towerman by the yardmaster. The towerman was acting entirely in recognition and response to the signal of

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the incoming train if he heard it. He says he did not hear it, does not remember how his attention was called to it. But it seems reasonably certain that his attention was called to the approach of the west bound train, either by its whistle, or seeing or hearing it approach, and that thereupon he threw the white light, without any instruction from the yardmaster whatever, and this seems to have been entirely within his authority.

On page 61 this question is asked:

“Q. You may tell us from your experience as a conductor, switchman and yardmaster there, what duties the towerman in the year 1901, during and before November, customarily exercised in that yard?

“THE COURT: The question is, what did the towerman do in November, 1901; what did he customarily do? A. If he was wanting a cross-over on Swan Creek, or if he was coming out Swan Creek, it was his custom for him to change those cross-overs, and let us in or out of there as he saw fit.”

The words “as he saw fit” were objected to and stricken out by the court, but the testimony stood so far as stating what his custom was in changing the cross-overs and letting trains in and out. Then this question was asked:

“Q. Suppose a train wanted to go west over the regular west bound track, and for some reason it was blocked, so that it could not get out, what was the custom and practice there in 1901, prior to November and including November, in the operation of the trains? A. In case the north bound was blocked and you wanted to send a train out over the north bound?

“Q. Wanted to send it west? A. Why, the towerman would block what we call tower Z and run the train over the south bound or the north track.”

Then there is some further testimony as to his general custom, but nothing that I need read. On page 63—if I had time I would like to go further back—this question is asked:

“Q. From whom do these orders come? A. From the general yardmaster or his assistants.

“Q. How about the towerman? A. And the towerman; it was under his jurisdiction. If he would be working by the tower, conveniently, orders always come from the towerman, if we were in the way, to get out of the way.

“Q. When you received orders from the towerman, what were the crews accustomed to do? A. Obey those orders.

“Q. Was there a telephone in the M. C. tower in the year 1901? [That means the Michigan Central, I suppose, and that was the tower occupied by McGrevy]. A. I believe so.

“Q. Connected with what? A. The general yardmaster’s office, also with Swan Creek, also at tower Z, at the intersection of the main line track and the Detroit branch tracks.”

Joseph Kilborey, the switch tender, used, as I find on page 66, this language in his testimony in answer to this question:

“Q. In 1901, November, and before, what did the towerman do in the performance of his work there? A. Why, his duty was to keep in contact with all trains and see that the movement of all the trains over the road would be right.

“Q. Suppose a switch engine approached on the Swan Creek track, called for the cross-over and at the same time one came down from the water plug track and called for the cross-over, what was the towerman in the habit of doing? A. One coming down and the other coming out? Why, the fellow that come out and had cars, hold him there and make the light engine come in, let him come in.”

He seems to be speaking of the duty of the towerman as to the direction and selection of trains coming in and going out.

On page 66 we find this question:

“Q. What, if any, warning or notice is the towerman accustomed to give trains in the vicinity of the tower? A. Calling out.”

We have then evidence of signals by the throwing of lights; we have the fact of a telephone in his office for communication with the other points; we have the fact testified to in another place as to his throwing of the semaphore in daylight, and we have now the instructions or signals by word of mouth. Then this question is asked:

“Q. What, if any, instructions have you heard the towerman give them in 1901, in the vicinity of the tower? A. Tell them to get out the way of this train coming.

“Q. What did the men do when the towerman told them these things? A. Get out of the way for them to come on.”

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On page 67 this question is asked of the witness Moore:

“Q. From whom did the towermen receive their instructions? A. From the yardmaster.

“Q. You may tell the jury what duties or what work the towerman at the M. C. tower did while you were yardmaster? A. Why, he operated switches and targets to a certain extent both east and west at that point and had control of them.

“Q. Go on and explain more fully what the towermen were in the habit of doing and did in carrying on their work in this tower, when you were yardmaster; what were the duties of the towermen; give it fully? A. The duties of the towermen were to operate switches that were connected by levers in the tower.

“Q. You may state in the practical carrying on of this work what the towermen actually did, if anything, in the matter of directing the enginemen in their work, to your knowledge as yardmaster, and with your approval? A. Enginemen in charge of engines are governed by both signals and the switches given to them by the towermen and also by signals.

“Q. Go on and tell what, if any, direction by word or otherwise, they were in the habit of giving them, to your knowledge, during the time you were engaged as general yardmaster. A. He had the general direction of all trains to and from the point and also from other points, by telephone that was on his line in the yard.

“Q. I do not understand that answer; you say he had the direction, what do you mean by that? A. Well, the direction is this; that he could direct the train to come from Broadway, or go to Broadway, by telephone, and he had the authority to do so, and he had the authority to let trains in and out, and to hold trains, according to his instructions from the yardmaster.

“Q. Did conditions arise there frequently when switching engines would be working in the vicinity of the tower, and not come under the observations of the yardmaster, when you were yardmaster? A. Yes, sir.”

On page 71 this question is asked:

“Q. While you were acting as yardmaster what were the enginemen in the habit of doing when the towermen gave them any instructions, if they did give them such instructions, that is, to obey them or not? A. They were controlled by the instructions and signals.

“Q. Did they obey any of his instructions? A. Yes, sir.”

He says in answer to another question (it is a very long one

and I will not read it, partly by the court and partly by counsel):

“A. Not only over the switches he has control over, but to give him written authority and control of trains from Swan Creek to Broadway. They had authority to do that. They were given instructions to give enginemen written instructions relative to the use of opposing tracks, have the authority to protect them on either track at night in the yard.”

There is a good deal more on this line. I will not attempt to call attention to all of it which has come under our notice. I will pass along to some testimony on page 77:

“Q. Would the yardmaster be advised of it? A. No, not certain points. The yardmaster or assistant yardmaster would advise the man at Swan Creek in the tower or the man at Michigan Central junction in the tower.

“Q. Don't you know that before the man used the west bound main track for switching purposes, wouldn't you be advised of that fact, before he began to use it? A. No, sir.

“Q. That was left entirely to the discretion of the pony conductor? A. That was left entirely to the towerman.

“Q. The towerman did not do any switching, did he? A. No, sir, but he—

“Q. In the first place, if you desired to use the west bound main track for switching purposes, the towerman did not have anything to do with it; in the first place, he did not determine whether they were going to use it or not? A. But it certainly was necessary for him to know it before he gave them the switch.

“Q. He would be advised? A. He would be advised by the conductor that wanted to use it.

“Q. Who would advise him? A. Either the conductor or the enginemen.”

Well, that goes to the custom of calling for the signals and the action of the towerman upon receiving such notice. This seems to be cross-examination. On page 78 this question is asked (speaking of the switching of trains):

“Q. Suppose it comes through the cross-over by the water plug track to the other track, how does the towerman know what they are going to use, unless he is notified? (This has reference to the train upon which Burtscher was employed). A. A tow-

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erman is supposed to let a train come into the yard, without he receives instructions from the yard master.

“Q. I am speaking of a train that has passed into the yard over the cross-over and suddenly stops; he would not know what they stopped for? A. No, sir. He has no jurisdiction over them after they pass that point.

“Q. (By the Court): After they pass the water plug switch? A. After they pass any point where they can not stop them; after they pass the west block.”

This perhaps bears more directly upon the claim of negligence of the towerman than it does to his relationship to the company or to Burtscher. He indicates there, as testified in another place, that he has some discretion as to the movements of trains. Then there is some further testimony about the giving of hand signals by the towerman. He may give the distance signal, may throw the lights, in the daytime throw the semaphore, he may signal by telephone, he may give written instructions, and he may give signals, as we have already learned, by word of mouth; he may also give signals by some motion of the hand.

On page 91, Mr. Burtscher, the plaintiff, testifies in answer to a question:

“Q. During the years you worked there after this tower was put in, you may state what the towerman was in the habit of doing and accustomed to do in carrying on his work, so far as you were concerned? A. Well, he had control of letting in trains and control of trains from coming into the yard by signals, home signals, and had this much control that he would—

“(Objection).

“Q. What did he do, do not use the word ‘control,’ just what he did? A. He operated those signals and targets operating the switches for trains to move in either direction on that semaphore.”

I have reference to a number of pages 90, 91, 92, 100, but I will not stop to read from them. On page 115 this question is asked:

“Q. During the progress of your work there for several years you worked in that vicinity of that tower, what, if any, practice was there as to the towerman giving verbal notice or word from the tower? A. I have received it.

“Q. Giving instructions by voice, by calling out from the tower? A. Why, yes; from the tower.

“Q. Was he accustomed to do it? A. Quite frequently.

“Q. What were some of those things, in what instances were those? A. Why, if there was some engine would be in the way switching through that portion of the track in his jurisdiction, if it became necessary—

“THE COURT: Q. What did he tell you—to get out of the way? A. Why, yes. He would say, ‘Get out of the way’ on the stone run or any run come, he would say, ‘Go ahead.’

“MR. THATCHER: Q. What would you do under those circumstances? A. I would go as far as I could, whenever my conductor—get out of the way if I could.

“Q. Did you do this when the yardmaster or his assistants were present? A. Yes, sir.

“Q. When those orders were given? A. Yes, sir.

“Q. Where the yardmaster could hear the orders? A. Yes, sir.”

James B. Cryan, an assistant yardmaster, testified in relation to the same matter. After testifying that the pony enginemen and crews were under the authority and instructions of the yardmaster and assistants, the question was asked:

“Q. Who else was accustomed to give instructions, if any one, to the crews of pony engines about their work there? A. Nobody but the yardmaster in particular. Of course he might send somebody out to notify them, some switch-tender to tell them what to do.

“Q. How about the towerman? A. Or the towerman if they were working in that vicinity.

“Q. What did the towerman do in cases of that kind then? A. He would notify them, whatever the instructions were, if they were to get out of the way, clear the track, he would notify them.

“Q. Suppose the yardmaster’s office did not have notice that a train was approaching, but there were several switch engines moving in the vicinity of the tower, in different directions, where the towerman has the switches to be operated from his levers, who directed the movements of the switch engines on such occasions? A. The towerman.

“Q. What were the engine crews and yard conductors and brakemen accustomed to do under these conditions? A. They would have to obey him.

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“Q. Obey the towerman? A. Yes, sir.

“Q. Was the towerman in the habit of keeping things moving through there, is that his business? A. That is his business.

“Q. Avoiding blocking of tracks and so on? A. Yes, sir.”

It is pretty hard to distinguish from this testimony and a great deal more of it along the same line, between the duties of what we might call a towerman and a sort of a vice-yardmaster, or vice-company, or vice-principal, or we might say, to put it in another form, that his duties are very similar on a small scale to those of a train dispatcher. He does not have the general direction of the movement of trains, but so far as the yard is concerned, in permitting the trains to come in there and go out of the yard, he seems to have control in the absence of the yardmaster, or, as possibly appears in some cases, when the yardmaster is present, the yardmaster not interfering with his giving some directions.

There is much more of this evidence that bears upon this question that I should be glad to read in view of the importance of the question, and perhaps its practical novelty in this state, but I am taking so much time that I will be obliged to omit an examination of much of the testimony that I have read and which I think bears upon the point.

The testimony of the witness Arnold on pages 121 and 122 may be referred to. Some of the testimony of Mr. McGrevy indicates that he had some discretion, some power, such as has been testified to by other witnesses. On page 203 this testimony appears:

“Q. How did you, as towerman, know whether the trainmen were going to use the west bound main track for switching purposes or any particular movements? A. You do not know unless you are told.

“Q. According to the practice and custom there, who was it informed you of their using it? A. Most invariably the men that were using it.

“Q. Who would that be. A. The conductor who happened to be switching there.

“Q. How long was that the custom while you were there as towerman? A. All the time while I was there.

“Q. I want you to state whether during the time that you were there as towerman, what was the custom and practice with reference to the use of that track down as far as the tower for switching purposes or for any purpose? A. That track has to be blocked.

“Q. (By the Court): What was the practice in November, 1901? A. As near as I can remember it was always done while I was there. If I was in the tower I always made it my business to do it before I gave them the switches.”

In cross-examination of the witness, McGrevy, this question is asked:

“Q. Wasn't it your duty to see that the trains were kept moving through the yard? A. Yes, sir.

“Q. To give orders to move and see that everything was as clear as possible? A. Yes, sir.

“Q. You were in the habit of giving orders to the men through the yard? A. Yes, sir; whenever it was necessary.

“Q. Were these men accustomed to obey your orders? A. Yes, sir.

“Q. How long had you been doing this? A. Ever since I was in the tower.

“Q. Had you been doing that in the presence of the yardmaster at times? A. I do not know that I ever saw the yardmaster present at the time.

“Q. From whom did you get your orders to do those things, the yardmaster? A. Yes, sir.

“Q. He has been frequently in the yard while you were doing that work? A. He has been on the ground, but I do not remember his being in the tower.

“Q. He could see the way you were carrying on your business? A. Yes, sir.

“Q. Did you not frequently send a man over the west bound track? (Objection.) A. Yes, sir.

“Q. Didn't the yardmaster at frequent times tell you to use your own judgment in giving orders—to send trains as you saw fit? A. Yes, sir.

“Q. Did you frequently call out to Burtscher and the other engineers and order them to go in a given direction? A. They had the switches to go up, it was not necessary for me to call out to them.

“Q. Did you frequently give them orders? A. I did when I thought it was necessary.

“Q. Did they obey your orders? A. Yes, sir.

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“Q. (By the Court): What do you mean by an order such as you say you gave? A. If I wanted a man to go on a certain track and the switch was given to him and he did not go, I would tell him that the switch was given for a certain track, if I thought he was not familiar with the switches.

“Q. (By Mr. Thatcher): Would the men go where you ordered them under those circumstances? A. Yes, sir.”

There is other testimony by Smith, the conductor, and Dunham, the fireman, bearing upon the question.

Now, when we remember that the duties of the train dispatcher are not to make a schedule, but simply to direct the movement of trains, it would seem as if the towerman had duties, which, upon a small scale are, as to a limited part of the road, very analogous to those of a train dispatcher; and, while the train dispatcher is not precisely, like a conductor, the direct superior of an engineer who has to obey him, he does, I think, under the general current of authority, stand in the relation of vice-principal as defined in the encyclopedia, in the part to which I have referred. I see no reason why a distinction should be drawn between these duties performed by the towerman and those of the train dispatcher, because they are, over a limited area of the defendant's road, very similar, and he represents the company to the same extent. The company is charged with the general duty of providing a reasonably safe place for the movements of its trains, for employes to work. Some of the courts have placed the liability of the company under such circumstances upon that principle, the duty of the company to provide a reasonably safe place to work. I do not know that the Supreme Court of Ohio has ever applied that principle to this particular kind of a case. But, upon the whole, remembering the rule laid down in *Pitts., Ft. W. & C. Ry. v. Lewis*, 33 O. S., 196, and *Ry. v. Margrat*, 51 O. S., 130, that the relationship as to superiority is to be determined in each case by the evidence in that case, that it is a question largely of fact, the court are unanimously of the opinion that the issue was properly one for the jury, and that there is no weight of evidence in this case against the theory contended for by the plaintiff, sufficient to justify any disturbance of the verdict.

The verdict is for \$13,500. It is perhaps a larger amount than the judges would have allowed if the matter had been presented to them as triers of fact. But we can not say, under the circumstances of the case, the nature of the plaintiff's injury, the length of time that has elapsed since the injury was sustained, the fact that he was in the very prime of his manhood, when he received the injury, that he was earning \$1,200 a year, and that he has been practically disabled from work, that the amount allowed by the jury is sufficient to indicate that they were influenced by passion or prejudice. Without that, the court could only proceed in making any modification of the verdict, in requiring any remittitur of any part of it, upon the theory that there has been some error of computation in determining the amount. But the amount is necessarily so indefinite, so difficult of ascertainment when we are dealing with such an injury as this, that it is not susceptible of such computation as may be made in many cases. One of the items entering into the assessing of damages is pain, physical and mental, that a man has suffered, and it is difficult to measure these things exactly in money. It must be largely a matter of discretion of the jury. And after a careful consideration of the whole question we have not thought best to disturb the verdict, notwithstanding the fact that it is somewhat larger than we should have been probably inclined to allow, had the matter been submitted to us in the first instance.

One of the judges of this court has made a computation, in order to ascertain what sum of money would purchase an annuity sufficient in amount for his livelihood during the years of his expectancy of life. We find that, looking at it from such a standpoint as that, the verdict is not very far in excess of the sum which would be necessary to purchase such an annuity. I mean to purchase an annuity which would be equal to the difference between his probable earnings during the residue of his life, or such time as he would be able to work, and the amount which he is now likely to be able to earn in his physical condition. We think the amount is not so far below the sum allowed by the jury as to justify us in saying that they might not

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have considered such an amount and added to it compensation for the suffering which the man had sustained, the operations that have been performed upon him during the treatment of the medical attendant, who, I believe, in this case was the surgeon of the company, and presumably he has received as good attention as could possibly be obtained for him. I say that under all these circumstances we have not thought best to disturb the verdict of the jury.

The judgment of the court below will be affirmed, without penalty.

E. D. Potter, for plaintiff in error.

C. A. Thatcher, for defendant in error.

LATERAL SUPPORT A PROPERTY RIGHT.

[Circuit Court of Summit County.]

HANNAH E. BELDEN V. WALTER A. FRANKLIN ET AL.

Decided, April, 1906.

Excavation—Interference with Lateral Support by—Right as to, can not be Abrogated by Statutory Provision—Constitutional Law—Sections 2676 and 2677—Injunction—Property Rights.

1. The right of the owner of land to lateral support is not a mere easement, but is a property right; and if the effect of a statutory provision is to abrogate the common law rule with reference to existing rights, such provision is unconstitutional and void, as being in contravention of Article I of Section 19, and Article II of Section 8 of the Constitution.
2. The effect of Section 2676, Revised Statutes, relative to injuries caused by excavations, is to amplify the common law rule as to lateral support, so as to create a liability for removing lateral support of buildings, where an excavation goes more than nine feet below the street grade. It does not modify the common law rule as to lateral support of the soil itself.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

This case was heard upon appeal, and is an action in which plaintiff asks that defendants be enjoined from removing the lateral support from, or undermining, or entering upon, plaintiff's premises, or removing sand and gravel therefrom.

The case was tried upon an agreed statement of facts, from which it appears that the parties own adjoining unimproved lots on North Howard street, in the city of Akron, near the top of North Hill, which are elevated high above the grade of Howard street; that for several years just prior to the filing of the petition herein, defendants were operating a sand and gravel bank or pit upon their own property, and in so operating said bank just prior to the commencement of this action and afterwards up until the filing of the amended and supplemental petition, defendants so removed the lateral support from, and undermined a large portion of plaintiff's property, that they caused plaintiff's land for some distance above the established grade of North Howard street and to a distance substantially more than nine feet below said established grade, to slip and slide from plaintiff's land upon defendants' land. It also appears that both proprietors trace their titles to a common owner, who divided and sold the lots separately in 1863, and that they have continued as separate and distinct estates ever since.

Under these facts plaintiff claims that defendants have no right to remove sand or gravel from their own premises in such manner as will cause the sand and gravel upon plaintiff's premises to slide or slip upon the lands of defendants.

Defendants, on the contrary, claim that by virtue of Sections 2676 and 2677, R. S. O. (1536-976 and 977) they have a right to excavate to a depth of nine feet below the established grade of Howard street, upon which the lots abut, or at least to the grade level of Howard street.

The doctrine of lateral support is thus stated by Cooley on Torts, page 706:

“Incident to the ownership of land is the right to lateral support by the land which adjoins it. This exists independent of contract, and to remove it, or to do anything which endangers it, is to commit a nuisance. Whoever, in the course of improvements on his own land, may have occasion to make excavations which endanger the land of his neighbor, must supply walls or other sufficient substitutes for the support which he removes. But this obligation is limited to the support of the land in its natural condition, and if the neighbor's land shall be weighted with buildings or other burdens, the owner of the servient tenement, in removing lateral support, can be held responsible only

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for such consequences as would have followed if the land had not been thus weighted.”

This common law rule has never been abrogated in Ohio, as will be seen by the following quotation from the opinion of Judge Spear, on page 270, of the case of *Joyce v. Barron*, 67 O. S., 264:

“The right of lateral support is held to be, not a mere easement, but as part of the owner’s property in the land. It is regarded as a right of property which necessarily and naturally attaches to the soil, and passes with it. As stated by Dickman, J., in *Burgner v. Humphrey*, 41 O. S., 340: ‘According to the doctrine held by the courts, as summarized by an approved text-writer (Woods’ Law of Nuisance) the right which the surface has to support, is a part of the freehold and not an easement.’ That the right exists as against municipal corporations as well as individuals is distinctly recognized in *Keating v. Cincinnati*, 38 O. S., 141, where White, J., remarks: ‘In this state private property is entitled to the same protection against all classes of corporations as against natural persons, subject to the right of appropriating such property to public use upon the terms of making full compensation,’ and, applying the principle, the court sustained a judgment awarding compensation to the plaintiff because the city, in making a street along a hill-side, so excavated the ground in the street as to cause the land above to slide and injure his lot.”

But defendants claim that this rule has been modified by the statutes referred to, which read as follows:

“Section 2676. If the owner or possessor of any lot or land, in any city or village, digs or causes to be dug, any cellar, pit, vault or excavation, to a greater depth than nine feet below the curb of the street on which such lot or land abuts, or, if there be no curb, below the surface of the adjoining lots, and by such excavation causes any damage to any wall, house or other building, upon the lots adjoining thereto, such owner or possessor shall be liable, in a civil action, to the party injured, to the full amount of the damage aforesaid.

“Section 2677. Such owner or possessor may dig, or cause to be dug, any such cellar, pit, or excavation, to the full depth of any foundation wall or any building upon the adjoining lot or lots, or to the full depth of nine feet below the established grade of the street whereon such lot abuts, without reference to the depth of adjoining foundation walls, without incurring the

liability prescribed in this chapter; and may, on thirty days' notice to adjoining owners, grade and improve the surface of any lot to correspond with the established grade of the street or alley upon which it abuts without incurring liability."

We are of the opinion, however, that by Section 2676 the rule has been amplified, and not modified, and that the statute creates a liability for removing the lateral support of *buildings*, where the excavation goes more than nine feet below the street grade, which liability did not exist before.

Section 2677, until 1894, did not have in it the last clause, which reads, "and may, on thirty days' notice to adjoining owners, grade and improve the surface of any lot to correspond with the established grade of the street or alley upon which it abuts without incurring liability."

Defendants claim that this clause has destroyed the right to lateral support of land which rises above the grade of streets in cities and villages. If so, under the case of *Joyce v. Barron*, above quoted, it has taken away a property right. That it has not removed the city's duty to furnish lateral support to abutting lots is apparent from the same case; for, if so construed, it would be contrary to the provisions of Section 19, Article I, of the Constitution, which provides that private property shall ever be held inviolate and shall not be taken for public use without compensation. The power of the Legislature to enact a law abrogating the common law rule of lateral support, in other words, to say, "private ownership of property rights known as lateral support, is hereby abolished," need not be argued, but if it were sought to extend the operation of such law to existing estates and rights, we apprehend it would be considered retroactive and inhibited by Section 8, Article II, of the Constitution.

And so here, plaintiff's right to lateral support, antedates the enactment of the amendment of 1894, and we hold that said statute in no way relieves defendants from protecting their lands from caving into their excavation, and the prayer of the petition is granted.

Musser, Kohler & Mottinger, for plaintiff.

Rogers, Rowley & Rockwell, for defendants.

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TERM OF OFFICE OF JUSTICE OF THE PEACE.

[Circuit Court of Morrow County.]

BUSHNELL V. KOON ET AL.*

Decided, June, 1903.

Office and Officer—Justice of the Peace—Term of Office Limited to Three Years from Date of Commission—Judgment Rendered During Interim of Terms Void.

S B D was elected a justice of the peace in and for Gilead township, Morrow county, Ohio, on the 4th day of April, 1899; he was commissioned as such justice on the 16th day of April, 1899; he took the oath of office on the 18th day of April, 1899, and gave bond as such justice on the 24th day of April, 1899. He was re-elected justice of the peace on the 7th day of April, 1902, and was commissioned on the 25th day of April, 1902. He took oath as justice of the peace on the 28th day of April, 1902, and gave bond on the 30th day of April, 1902. The judgment sought to be enjoined in this action was rendered by him on the 15th day of April, 1902, on a bill of particulars filed prior to April 12, 1902. *Held:*

1. That the term of office of justice of the peace is limited to three years from date of commission.
2. That a judgment rendered during interim of terms is void and of no effect, and ought to be enjoined.

VOORHEES, J.; MCCARTY, J., and WINCH, J., concur.

Error to the Court of Common Pleas of Morrow County.

The plaintiff's action is one for equitable relief, to enjoin the defendant, Henry C. Koon, from enforcing a judgment rendered in his favor against the plaintiff by his co-defendant, Samuel D. Bush, acting in the capacity of justice of the peace, at the time the judgment in question was rendered.

The contention of the plaintiff, as presented in his petition and by an agreed statement of facts submitted to the court, may be briefly stated as an action on the part of the plaintiff to enjoin the defendants from enforcing a void judgment. That the defendant, Bush, is threatening to issue an execution on the judgment claimed to be void by the plaintiff and that both of

*Affirmed by the Supreme Court without report, December 13, 1904 (70 Ohio State).

the defendants are irresponsible and insolvent, and, therefore, he has no adequate remedy at law and would suffer irreparable injury if this judgment was enforced in the way that it is threatened to be done, by execution; and, in order to restrain the defendants from thus seizing his property, this action is brought by the plaintiff.

The real question in the case, as shown by the agreed statement of facts and as presented to the court is, whether, at the time this alleged judgment was rendered, the defendant, Bush, was a justice of the peace. If he was a justice of the peace then it is conceded the judgment was regular, and this plaintiff could not maintain this action; otherwise, the judgment was null and void and plaintiff has a cause of action. The real issue presented is: When does the term of a party who has been elected to the office of justice of the peace commence, and when does it expire?

The Constitution, Article IV, Section 9, provided that the term of office of a justice of the peace shall be three years, but the date for the beginning of the term is nowhere expressly fixed either in the Constitution or by statute. It is not provided, either by the Constitution or by statute, that the office of justice of the peace may continue until his successor shall be elected and qualified; that is not a provision of the law, except in case of appointment to fill a vacancy, as provided in Section 567, Revised Statutes of Ohio. But it is definitely fixed that his term of office expires at the end of three years from the time it commences to run; and the Legislature has no power to extend the term or tenure of such office beyond the time so limited (*The State, ex rel, v. Howe*, 25 O. St., 588; *The State, ex rel Attorney-General, v. Brewster*, 44 O. St., 589). The question that we have to determine here is, when does it commence?

There are certain things that are necessary in order that a person may be qualified or clothed with the authority of a justice of the peace. He must be elected to the office; he must be commissioned by the governor of the state; when commissioned he must forthwith take and subscribe the necessary oath appertaining to the office; and, finally, he must give bond as required by the statute (Sections 83 and 579, Revised Statutes of Ohio).

Section 83 of the Revised Statutes provides:

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“Each judge of the Supreme Court * * * and justice of the peace * * * shall be ineligible to perform any of the duties pertaining to such office until he shall receive from the governor a commission to fill such office, upon producing to the proper officer or authority a legal certificate of his being duly elected or appointed.” * * *

Section 579 of the Revised Statutes provides:

“When a person is elected to the office of justice of the peace, and receives a commission from the governor, he shall forthwith take and subscribe the necessary oath appertaining to the office, before the clerk of the court of common pleas of his county who is authorized to administer the same, or before a justice of the peace of his county, who shall, within ten days, transmit the oath to the clerk aforesaid, who, in either case, shall file the same, and make record of it in a book provided for that purpose; and each justice of the peace so qualified shall, before he is authorized to discharge any of the duties of his office, and within ten days after taking the oath, enter into bond, to be approved by the trustees of his township, payable to the state, with at least two sufficient sureties, with a penalty of not less than one thousand nor more than five thousand dollars, at the discretion of the trustees, to be deposited with the township treasurer, unless the township treasurer is the justice elect then with the township clerk, conditioned that such justice shall well and truly pay over, according to law, all money which shall come into his hands by virtue of his commission, and also that he shall faithfully perform every ministerial act that is enjoined upon him by law; and on refusal or neglect to enter into such bond, the office shall be deemed vacant, and the trustees shall give notice of a new election to fill the vacancy.” * * *

Judge Swan in his Treatise, Chap. I, Section 5, under the heading of “Term of office of justices of the peace,” says:

“By the Constitution the term of office of justices of the peace is limited to three years. The three years are computed from the date of the commission.”

The author gives as authority for his statement, that the three years are computed from the date of the commission, Section 581 of the Revised Statutes, which provides:

“Every justice of the peace, when commissioned shall, in thirty days thereafter, transmit the date thereof to the clerk

of the township, who shall make an entry thereof in a book by him to be provided for that purpose, and before the first day of February of each year, the clerk shall give a written notice to the trustees of all commissions expiring within twelve months after the first day of April following, and the date when each such justice's commission will expire, and the trustees, on receiving such notice, shall notify the electors of such township to elect at the next regular spring election thereafter, a justice of the peace to fill each such vacancy, in the manner pointed out in Section 567." * * *

We think it is implied from this section, though not expressly stated, that the Legislature intended the date of the commission should govern in determining the expiration of the term of office of a justice of the peace and for the giving of notice of election to fill vacancies.

It was said by Judge Hitchcock, in *State, ex rel Brown, v. Constable*, 7 Ohio Reports, 1st Pt., page 1, on page 11, that—

“When no day is mentioned in the law from which term of service shall commence, it must commence from the day of election. Any other construction would lead to this absurdity, that the officer would have it in his power to fix the commencement of the term of service for himself and his successor, at any time he should think proper to qualify.”

This was not a case of a justice of the peace, and we think the reasons assigned by Judge Hitchcock do not apply to such officer. From experience we know that it is impossible for an officer to be elected and commissioned on the same day; and further, if the term of office commences on the day of election the term of a justice may not have expired at the time of the election of his successor, and, therefore, there was no vacancy on the day of election, and two officers would then be qualified for the same office—one, because his term of three years had not expired, the other, because he had been that day elected to that office. Also, it would be possible, and at times an unavoidable necessity, that there be an interim between the expiration of term of one justice and the election of his successor, which would occur when the date of election is subsequent to that of the expiration of the first term.

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We think that Section 581, Revised Statutes, clearly implies that the term of office of a justice of the peace commences on the date of his commission, and continues for three years from that date.

The case of *Sawyer v. Pollner*, 18 Cir. Ct. (Ohio), page 304, 310, refers to the commencement of the term of office of mayor. In the report of that case it appears that at the annual election held on the first Monday, the 3d day of April, 1899, John H. Farley was elected mayor of the city of Cleveland by a popular election; that on the 10th day of April, 1899, being the second Monday of April, he took the oath of office as mayor of the city of Cleveland at 10 o'clock A. M., and at the same time prepared and filed a good and sufficient bond as such mayor. It was not considered by the court that municipal officers, such as mayor, should be commissioned as provided by Section 83, Revised Statutes, and we understand the practice to be that such officers are not commissioned, but that it is only required that their election be duly certified, and they take the oath of office and give a good and sufficient bond as such officer. We do not consider this case as applicable to a justice of the peace, and, therefore, are inclined to adopt the statement of Judge Swan as the rule for determining when such term commences.

In this case, as presented by the agreed statement of facts, Bush was elected justice of the peace April 4, 1899. He was commissioned on the 12th day of April, 1899; he was sworn in on the 18th day of April, 1899; he gave bond as justice of the peace on the 24th day of April, 1899. He was re-elected April 7, 1902; he was commissioned on the 25th day of April, 1902; he was sworn in on the 28th day of April, 1902, and gave bond on the 30th day of April, 1902. On the 15th day of April, 1902, the action, wherein the judgment complained of was rendered, was tried before this man who was assuming to act as justice of the peace. His first term of office terminated on the 11th day of April, 1902, at midnight, and his second term did not commence until the date of his second commission, which was April 25, 1902. His first term of office having terminated at the time he undertakes to do this act, that is, to render this judgment, and not having been commissioned for his second

term and not having complied with the requirements of the statute to clothe him with authority of a justice of the peace, he was without any authority as such official. If the language of the statute were, that he should discharge the duties of his office until his successor was elected and qualified, then it would be a very different case, and during the interim he would be clothed with authority and power to do the same act as he could before his successor was qualified. But suppose this man had not been his own successor, and after being elected to the office of justice of the peace and before he was commissioned as such or qualified himself by giving bond and taking the oath of office, he undertakes to render a judgment in an action? He would be absolutely without authority or power to do so, and his act would be void.

We, therefore, hold that this party, who assumed as justice of the peace to render this judgment at the time he did, had no authority to render a judgment; and the judgment so rendered is absolutely void. The effect is this, that the judgment the defendant, Koon, obtained was a void judgment, and he is seeking to enforce it against the plaintiff on execution, which gives plaintiff a right to come into a court of equity and enjoin the collection of such judgment by execution or otherwise. It is not material whether the party attempting to enforce such judgment is insolvent or not; a party who undertakes to enforce a void judgment can be enjoined from so doing irrespective of whether or not he is insolvent.

We think that the plaintiff is entitled to have this injunction made perpetual; and that will be the decree of the court. The defendants are enjoined from enforcing or attempting to enforce this judgment, and it will be at the costs of the defendants.

Injunction made perpetual.

Mitchell & Bruce, for plaintiff in error.

L. K. Powell, for defendant in error.

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**CONTROL AS TO BRIDGES OVER NAVIGABLE
WATER-WAYS.**

[Circuit Court of Ashtabula County.]

THE STATE OF OHIO, EX REL. LEWIS HARPER, A TAX-PAYER, V.
THE COMMISSIONERS OF ASHTABULA COUNTY.

Decided, September Term, 1905.

*Constitutional Law—Authority of War Department—To Condemn
Bridges Obstructing Navigable Waterways—Jurisdiction of State
Courts—To Enjoin County Commissioners from Carrying Out Or-
der for Replacing of Bridge—Validity of the Ohio Bridge Act of
1904.*

The act of March 24, 1904 (97 O. L., 53), authorizing county commis-
sioners to remove bridges which have been condemned by the
War Department, under authority of law as an obstruction to
navigation, and rebuild them in accordance with plans for the
improvement of navigation, is a valid law; and the order of the
Secretary of War with reference to the removal of the county
bridge over the Ashtabula river, on Bridge street in the city of Ash-
tabula, Ohio, was a valid order.

BURROWS, J. (dissenting.)*

In this action the court of common pleas held, on general de-
murrer to the petition, that it did not state facts sufficient to
entitle the plaintiff to the relief therein demanded.

The circuit court, on error, reverses that judgment and directs
the court of common pleas to overrule the demurrer and grant
a temporary injunction as prayed for in the petition.

That there may be no mistake as to what the petition contains,
a full copy, omitting the caption, is here given :

“The defendants are the duly elected, qualified and acting
commissioners of Ashtabula county.

“Your relator is a citizen, resident and tax-payer of Ashtabula
county, and brings this action for the benefit of said county and
its tax-payers.

“On March 20, 1905, relator, as such tax-payer, duly requested
the prosecuting attorney of said county, in writing, to bring this
action, and he refused to do so.

* For majority opinions, see 7 C. C.—N. S., 469.

“The defendants are about to, and unless enjoined they will, construct a new bridge across the Ashtabula river, upon the line of Bridge street at Ashtabula harbor in the city of Ashtabula, at a cost of two hundred thousand dollars, and ask for bids and enter into a contract for building the same, and issue and sell the bonds of said county in the sum of two hundred thousand dollars and appropriate the proceeds thereof to pay for the construction of said bridge, and levy a tax on the people of said county to provide for the redemption of said bonds and the interest to accrue thereon. They have advertised to sell said bonds and invited bids therefor.

“The defendants have not submitted to the voters of said county, the question as to the policy of building said bridge, and do not intend to do so.

“There has been no casualty requiring the construction of said bridge, but it is intended to replace the one now in use at said place that is in good condition, repair, and perfectly safe for public travel.

“The defendants claim authority and the right to proceed as aforesaid under an act of the General Assembly of the state of Ohio, entitled ‘An act to authorize county commissioners to issue bonds and levy a tax for the purpose of rebuilding, replacing or constructing anew any bridge or bridges condemned or ordered removed by the war department of the United States,’ passed March 24, 1904, and approved March 26, 1904 (97 O. L., 53), and under an order claimed to have been issued by the War Department of the United States, notifying the defendants to make certain changes and alterations in the bridge which now crosses the river at said place.

“Said order purports to have been made by virtue of Section 18 of 30 U. S. Stat. at L., 1121, entitled ‘An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,’ approved March 3, 1899, and under the claim that said present bridge is an unreasonable obstruction to the navigation of said river and harbor (which are navigable waterways). Said act does not apply to counties or county commissioners, and confers no authority upon the War Department or Secretary of War to make the order aforesaid. Said act is only enforceable, as fully appears by its terms, by criminal prosecution, and by conviction and punishment for crime. If said act applies to counties, it contravenes the Constitution of the United States, and exceeds the power granted to Congress by the Constitution, and it is, therefore, null and void.

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“Said order was made arbitrarily, without authority of law, without hearing or evidence, and contrary to the facts. Before its issuance, Dan. R. Kingman, a United States engineer, called the defendants to several conferences, and in May, 1904, to what is claimed to be a final hearing before him at Cleveland, Ohio. No evidence whatever was offered at said pretended hearing to the effect that the present bridge is an unreasonable obstruction to navigation, and nothing whatever was offered in favor of the issuance of said order, except the statements, not under oath, of representatives of the Lake Shore & Michigan Southern Railway Company, and the Pennsylvania Company, that the proposed change would greatly benefit said railroad corporations, and enhance the value of their dock and river property at said harbor, and give to said Pennsylvania Company at least fifty feet of additional dock frontage; and that, if the order were made, said railroad corporations would contribute largely to the expense of building said new bridge. Thereupon said engineer stated that the order would be issued, and afterwards, to-wit, in June, 1904, an order was issued as aforesaid, but not, however, until after the first application or recommendation of said engineer to the War Department for said order had been refused and turned down by that department. All of which fully appears by the records of the office of said engineer at Cleveland, Ohio.

“Your relator informs the court that said railroad corporations own valuable docks and lands available for dock purposes at said harbor that will greatly enhance in value by the proposed change (which change will be hereinafter specifically pointed out); that said Pennsylvania Company owns docks on the west side of the river just south of and adjacent to said present bridge and will acquire by the proposed change at least fifty feet of additional dock frontage out of what is now the navigable channel of said river; that said United States engineer was induced to cause said order to be issued by the promise of said railroad corporations to contribute largely to the expense of the proposed new bridge, but that said corporations have ever since wholly failed and refused to contribute anything whatever therefor.

“Said present bridge was built by the Commissioners of Ashtabula County, in 1889, with the approval of the lake carriers and vessel owners and their associations, has been in operation ever since, is now sound, in good condition, repair, and perfectly safe for public travel. It is a swing bridge with a 120 foot draw, with its navigable opening exactly over and substantially the entire width of the present and natural channel of the river at

that point and its center pier, on which the bridge swings, on the east side of the river, entirely east of the established dock and harbor lines of said harbor.

“Said bridge is not an unreasonable obstruction to navigation. The largest boats on the lakes are only fifty-five feet in width and less than 600 feet in length. At the point said bridge crosses there is a bend in the river with its outer curve to the west. If there is any difficulty in passing said bridge by the largest and longest boats it is owing to the shape of the river and not to any fault of the bridge.

“The order aforesaid notifies the defendants to entirely remove said center pier of the present bridge and dredge and excavate at said point to a depth of twenty-one feet below mean lake level, but makes no complaint or order concerning the west abutment of said bridge.

“The defendants propose, intend to, and will, unless enjoined, entirely remove the present bridge and excavate on the east side of the river where its center pier now is to a depth of twenty-one feet below mean lake level, and build a new bridge of the jack knife or lift pattern with its east abutment in Bridge street (formerly a country road) at least fifty feet east of the established dock and harbor lines of the harbor, and about the same distance east of the water line of the river which very nearly coincides with the harbor line at that point, and its west abutment and the street leading thereto extended at least fifty feet out into the present and navigable channel of the river. This will cut off at least fifty feet from the west side of said navigable channel and constitute a serious obstruction to navigation, and will necessitate the dredging out and making a new navigable channel for said river east of the present one with its eastern boundary entirely east of and beyond the present eastern harbor and water lines of the river.

“Your relator informs the court that the object sought to be accomplished by said order, and the proposed plans and work of the defendants, is to straighten said river by moving its channel at least fifty feet east of the present location, and permit the said Pennsylvania Company to fill in and reclaim for dock purposes an equal distance out of the west side of the present navigable channel of the river.

“The aforesaid act of the General Assembly of the state of Ohio contravenes—

“Sections 1, 2, 19, 20, Article I; Sections 22, 26, Article II; Sections 5, 7, Article X; Sections 2, 5, 6, Article XII; Section I, Article XIII of the Constitution of Ohio, and the Fifth and

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Fourteenth Amendments to the Constitution of the United States. Said act contravenes other provisions of the state and federal Constitutions, is void and of no effect, and confers no authority upon the defendants to do the acts intended. At the time said act was passed and ever since there has been no other bridge in the state under the control of county commissioners, claimed to have been condemned or ordered removed by the War Department of the United States.

“Wherefore, your relator prays that the defendants be enjoined from issuing and selling said bonds, and appropriating the proceeds to the building of said bridge, and levying said tax, and entering into contracts for said purposes, and for such other and further relief as is proper.”

This action was commenced on the relation of a tax-payer under favor of Revised Statutes, 1277, 1278. The matters that may be investigated and enjoined in such proceedings are enumerated in Revised Statutes, 1277, which provides:

“The prosecuting attorneys of the several counties of the state, upon being satisfied that the county, or any public money in the hands of the county treasurer or belonging to the county, are about to be, or have been, misapplied, or that any such public moneys have been illegally drawn out of, or withheld from, the county treasury, or that a contract in contravention of the laws of this state has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, * * * may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of any such illegal contract not fully completed.” * * *

Revised Statutes, 1278, provides that when the prosecuting attorney for any reason can not bring the action, or refuses to do so on written request, the action may be instituted by a taxpayer in the name of the state.

An inspection of the petition shows that this action is based upon such allegations therein as charge that the defendants, as county commissioners, are “about to enter into a contract” for the building of a new bridge “in contravention of the laws of this state;” and accordingly, the whole question is whether it appears from the petition that the proposed action of the com-

missioners in contracting for the removal of the present bridge and building a new one, is in contravention of the laws of this state.

Unquestionably, the authority of county commissioners to build bridges or raise money for that purpose must be conferred by statute, and any attempt on their part to do either in the absence of such authority would be in contravention of the laws of this state. Prior to 1904 their power to build and repair bridges in their county when the cost did not exceed \$10,000 was limited only by their discretion and judgment; but when the cost exceeded that sum, a vote in favor of the project was necessary. This limitation did not apply, however, in cases of casualties to certain important bridges. By the act of March 24, 1904 (97 O. L., 53), county commissioners were authorized in cases therein specified to remove and rebuild bridges at a cost not exceeding two hundred thousand dollars. This act is as follows:

“An act to authorize county commissioners to issue bonds and levy a tax for the purpose of rebuilding, replacing or constructing anew any bridge or bridges condemned or ordered removed by the War Department of the United States.

“*Be it Enacted by the General Assembly of the State of Ohio:*

“Section 1. That the county commissioners of any county having control of any bridge or bridges which have been condemned or ordered removed by the War Department of the United States, under authority of law, as an obstruction to navigation, shall have power to remove such bridge or bridges and to rebuild or replace the same or construct a new bridge or bridges over the stream or streams crossed by the bridge or bridges so condemned or ordered removed; and for that purpose such commissioners shall have power to purchase or appropriate property, in the manner provided by law, to widen the channels of such stream or streams.”

It is self-evident that if this is a valid law, and the bridge had been lawfully condemned or ordered removed as provided in said act, the proposed action of the defendants was in pursuance of the laws of this state. The fact that the majority opinions go no further than to doubt its validity does not call for an

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extended discussion of this question, inasmuch as it is a settled rule of decision in this state and elsewhere that it is only when the irreconcilability of a legislative enactment with the Constitution is clear and free from doubt that courts are warranted in declaring such enactment invalid. This sort of legislation is common in this state and has been from its earliest history. The amount of public money that may be expended by public officials for one public purpose or another, under one set of circumstances or another, has always been determined by the Legislature and its competency to make such determination has never been questioned. Indeed, if this law is not valid, why is not the statute giving authority for large expenditures in cases of casualties to highways and bridges, and all laws making discrimination as to the amounts that may be expended for public purposes under various circumstances unconstitutional? The many authorities cited by counsel for the defendants and published in connection with the majority opinion fully cover this question.

The power to expend such sum of money for the purposes named in said act is made to depend upon the existence of the following facts: The bridge must be over a navigable waterway of the United States; it must have been condemned or ordered removed by the War Department; and, such condemnation or order must be made under authority of law.

The action of the War Department contemplated by this act is derived from Section 18 of 30 U. S. Stat. at L., 1121, which is as follows:

“That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water-craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporation owning or controlling such bridge so to alter the same as

to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such person, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, that in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

By the terms of this statute the action of the War Department therein authorized is limited to bridges "over the navigable waterways of the United States;" and, therefore, at the outset of this discussion, it must be determined whether the bridge in question was over such waterway. That the bridge is over a waterway, navigable for the largest boats on the lakes, is asserted in the petition, while the authority of the United States over the same is not denied but is impliedly assumed by its averments. It is therein alleged that the present bridge was built with the approval of the lake carriers and vessel owners and other associations, thereby assuming and implying that such associations were interested in the free navigation of this stream and that the bridge was built so as not to prejudice their interests. At this day it will hardly be contended that a stream which by itself or in connection with other waters forms a continuous

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channel through which interstate commerce is carried on is not a waterway of the United States. It is stated and reiterated in the majority opinion, as if it were a circumstance of importance, that this harbor and river lie wholly within this state. The same might be said of all of Lake Erie lying north of Ohio up to the Canada line; and all the rivers and inland lakes of this country outside of the District of Columbia and the territories, lie wholly within one or more of the states. What constitutes a river or other body of water a waterway of the United States, was determined and elucidated by Chief Justice Marshall eighty years ago; and the correctness of his definition and decision has ever since remained unquestioned. In *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), he says, at page 194:

“Commerce among the states can not stop at the external boundary line of each state, but may be introduced into the interior.

“It is not intended to say that those words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.”

Again, page 195:

“The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right.”

Again, page 196:

“This principle is, if possible, still more clear, when applied to commerce ‘among the several states.’ They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce ‘among’ them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states.”

Again, page 197:

“The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with ‘commerce with foreign nations, or the several states.’ ”

The following are citations from the U. S. Digest:

“All our waterways are navigable waterways of the United States within the meaning of the acts of Congress in contradistinction from navigable waters of the states where they form in their ordinary condition, by themselves or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

“*Steamer Daniel Ball v. United States*, 77 U. S. (10 Wall.), 557; *The Montello*, 78 U. S. (11 Wall.), 411; *The Montello*, 87 U. S. (20 Wall.), 430; *Cardwell v. Bridge Co.*, 113 U. S., 205.

“The Chicago river and its branches, although entirely within the limits of Illinois, form, in connection with other waters, a continuous channel for commerce among the states, and are therefore navigable waters of the United States, subject to the commercial power of Congress. *Escanaba Co. v. Chicago*, 107 U. S., 678.

“By ‘navigable waters of the United States’ are meant such as are navigable in fact, and which, by themselves or their connections with other waters, form a continuous channel for commerce with foreign countries or among the states.” *Miller v. New York*, 109 U. S., 385.

Applying the definition of a waterway of the United States, as established by these decisions, to the averments of the petition, and to the facts derived from common knowledge and official documents which show that this river and harbor is a part of a continuous channel and highway of interstate commerce of such importance that the government has expended and is expending large sums of money in improving the same, with what reason can it be said that this bridge is not over a waterway of the United States?

The next question is: Was the bridge condemned or ordered removed by the War Department? As both majority opinions practically concede that such order was made by the Secretary

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of War, that question might be passed without further discussion. The petition expressly avers that the commissioners claim the right to build the bridge "under an order claimed to have been issued by the War Department of the United States;" that "said order purports to have been made by virtue of Section 18 of an act of the Congress of the United States;" that, "before its issuance, Dan. R. Kingman, a United States engineer, called the defendants to several conferences, and in May, 1904, to what is claimed to have been a final hearing before him at Cleveland, Ohio;" that "nothing whatever was offered in favor of the issuance of said order except the statements, not under oath, of the Lake Shore & Michigan Southern Railway Company and the Pennsylvania Company * * * that the proposed change would greatly benefit said railroad corporations, and that, if the order were made, said railroad corporations would contribute largely to the expense of building said new bridge. Thereupon said engineer stated that the order would be issued, and afterwards, to-wit, in June, 1904, an order was issued as aforesaid but not, however, until the first application or recommendation of said engineer to the War Department for said order had been refused and turned down by the War Department."

The claim, therefore, that such order was not issued by the War Department can only be maintained by denying the truth of the averments of the petition.

The remaining pertinent question is: Was the order of the War Department made under authority of law? The grounds upon which it is claimed that it was not are: That Section 18 of said act is unconstitutional; that it attempts to delegate to an executive officer judicial and legislative functions; and that bridges under control of county commissioners are not within the purview of this section.

It is asserted that Congress exceeded its power when it invested the Secretary of War with the authority and duty of determining whether a bridge was an unreasonable obstruction to navigation, and of directing the changes to be made to obviate the difficulty. The power of Congress to adopt such means as it deems appropriate to prevent the obstruction of its navigable waterways

is limited only by its discretion and by such restrictions as are imposed by the Constitution. This is authoritatively held in the case of *Gibbons v. Ogden*, *supra*. At page 196, Chief Justice Marshall in announcing the unanimous opinion of the court says:

“We are now arrived at the inquiry, what is this power?

“It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence that their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.”

The supremacy of Congress is illustrated in *Pennsylvania v. Bridge Co.*, 59 U. S. (18 How.), 421, where it is held that Congress may nullify a decree of the Supreme Court by which a bridge had been pronounced a public nuisance and an obstruction to navigation. The only restrictions upon Congress in the exercise of this power is found in that part of the Fifth Amendment to the federal Constitution which provides that:

“No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

It is apparent from the whole context of this section that no property is or can be taken until after the right to do so is adjudicated in a court of competent jurisdiction. The rule

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applicable to such case, as formulated by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S., 104, is this:

“That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law.”

This proposition is quoted and approved by our Supreme Court in *State v. Jones*, 51 Ohio St., 492, 516, and *Probasco v. Raine*, 50 Ohio St., 378, 392. The Secretary of War is authorized to do no more than make a preliminary investigation to ascertain whether in his opinion a bridge complained of is an unreasonable obstruction to navigation and direct the changes which in his opinion are necessary; and determine the reasonable time in which the suggested changes shall be made, and notify those having control of the bridge thereof. If the suggested changes are not made within the time specified in the notice it is his duty to notify the United States District Attorney of that fact; and there his authority and duty in the matter end. If any further action is taken it must be had in the courts. All assertions that this section gives or attempts to give to the Secretary of War power to make final adjudication or compel the removal of bridges or the construction of new ones are unwarranted. It can not be doubted that Congress has ample power to provide by appropriate legislation that all obstructions to the free navigation of the waterways of the United States shall be removed. At common law and by the statutes of the several states an obstruction of navigable water is made a misdemeanor. It is usually provided that when the party charged in an indictment is found guilty of maintaining a nuisance its abatement may be ordered by the court. In this act, however, no provision is made for an order of abatement, and the only method that can be

pursued to secure the enforcement of the requirements of the secretary is the repeated prosecution and imposition of penalties therein provided. In prosecutions under this section it must be alleged and proven that the defendant "willfully" neglected or refused to comply with the order of the secretary. It has been held that the word "malicious" is equivalent if not more than equivalent to "willfully" in a criminal statute, and that "unlawfully" is not. Charging an act as done willfully imports that it is done intentionally and in disregard of duty, and not for the purpose of maintaining, in good faith, some legal right. As we have seen, the order of the secretary is ineffective except as a basis for prosecutions, and the assumption that every right of the defendant on trial for failure to comply with the order of the secretary, will not be duly considered and preserved in such prosecution, is an unjust imputation upon the courts.

But there is another and better interpretation of this phrase, "under authority of law" as used by our Legislature, which renders the discussion of the validity of the act of Congress far fetched and unnecessary. The petition alleges that this act of 1904 was passed March 25, for the purpose of enabling this particular bridge to be built; and whether that is so or not, the purpose of the act was to enable county commissioners in such cases, to avoid the delay incident to raising money by taxation or in pursuance of a vote. Section 18 of the act of Congress was the only act then in force authorizing the Secretary of War to condemn bridges or order them to be removed. It is to be presumed that the legislators had knowledge of this section and had reference to it when they used the phrase "under authority of law." The General Assembly assumed, as it had a right to assume, that the Secretary of War was duly authorized to make such order; and the true intent and meaning of the phrase "under authority of law" as used by the Legislature, was that county commissioners should be authorized to act when a bridge was condemned or ordered removed by the War Department in pursuance of Section 18 of the act of Congress passed March 3, 1899.

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The logical force of the criticism that Section 18 of said act of Congress invests the Secretary of War with legislative or judicial functions or both is reduced to small proportions when it is remembered that the scope of this power is limited as has been shown to making an investigation and directing what changes are in his opinion necessary.

But were it otherwise and the power to hear and determine these questions judicially given to the secretary, his exercise of such jurisdiction would be unobjectionable so long as his decision was reviewable in the courts. In *State v. Harmon*, 31 Ohio St., 250, White, J., in speaking of the power of the committee of the state senate to hear and determine an election contest, says at page 258:

“The power of allotting to the different departments of the government their appropriate functions is a legislative power; and in so far as the distribution has not been made in the Constitution, the power to make it is vested in the General Assembly, as the depository of the legislative power of the state.”

Again:

“Whether power, in a given instance, ought to be assigned to the judicial department, is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may appropriately be assigned to either of the departments.

“It is said, authority to hear and determine a controversy upon the law and fact is a judicial power. That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power. The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the government as to the judiciary. Judgment and discretion are required to be exercised by all the departments.”

In *Probasco v. Raine*, 50 Ohio St., 378, the first proposition of the syllabus is:

“If a statute is constitutional, it is valid, and can not be set aside by a court, as being against public policy or natural right.

There can be no public policy or right in conflict with a constitutional statute.”

The question in that case was whether a judicial power could be conferred upon the auditor of the county. In speaking of this subject Burket, J., says, at page 391:

“The result to be attained by the laws to be passed under this section, is equal taxation, but the means by which that end shall be attained, is left to the judgment and sound discretion of the Legislature acting within the power conferred by the Constitution.

“To have equality in taxation, all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services, either by fees or salary. The Legislature has full power under the Constitution to say what officer shall perform such duties, and in what manner he shall be paid.

“It has enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in Section 1071. In the opinion of the Legislature this is a proper means to attain, in part at least, equal taxation. It matters not whether the auditor acts judicially or ministerially in the discharge of his duties. The Legislature is free to employ such means, as in its opinion, shall be most effective, whether they be judicial or ministerial or both.

“The objection urged in argument that a man can not be a judge in his own case is a fallacy. The auditor has no case to be judged, but on the contrary, he is the taxing officer before whom other parties are cited to appear and show cause why they should not bear their equal burden of taxation. His actions in the premises are subject to review in the courts, and thereby due process of law is had.”

Under the grant of power to regulate commerce among the states an interstate commerce commission was created some years since with the power to hear and determine complaints of unreasonable rates charged by railroads. A bill is now pending in Congress by which it is proposed to enlarge the authority of this commission with a view of increasing its efficiency. This has led to a wide discussion in and out of Congress of the constitutionality and propriety of conferring such power upon the commis-

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sion; and it may be safely said that no lawyer, statesman, publicist, or jurist has as yet doubted the power of Congress to confer this jurisdiction upon the commission, provided adequate provision is made for the review of its decisions by the courts.

The further and last question made by the petition, and apparently relied upon in the majority opinion, is that the bridges controlled by the officers of the civil division of the state are not within the provisions of said Section 18 and that the words "persons, corporation or association" do not include county commissioners. No authority is referred to in support of this contention. In the reported cases where prosecutions have been maintained against county commissioners, this question has not been suggested, although it has been held that no penalty could properly be imposed upon them where they were unable to comply with the order of the War Department for want of funds. That the term "persons" used in a statute, when necessary to make its provisions effective and consistent, may include artificial persons, such as bodies politic and corporate, deriving their existence from legislation, as well as natural persons and co-partnerships, is decided or illustrated by the following cases: *United States v. Fox*, 94 U. S., 315, 321; *Pembina Consol. S. M. & M. Co. v. Commonwealth*, 125 U. S., 181, 189; *Beaston v. Bank*, 37 U. S. (12 Pet.), 102, 134; *United States v. Amedy*, 24 U. S. (11 Wheat.), 392; *Santa Clara Co. v. Railway*, 18 Fed. Rep., 385, 404; *Krug v. Davis*, 87 Ind., 590, 596; *State v. Herold*, 9 Kan., 194; *Forrest v. Henry*, 33 Minn., 434, 436; *Coddington v. Haven*, 8 N. J. Eq. (4 Halst. Ch.), 590; *Martin v. State*, 24 Tex., 61; *Cincinnati Gas Light & C. Co. v. Avondale*, 43 O. S., 257; *Steam Canal Boat Tempest v. Lucas Co. (Comrs.)*, 13 C. C., 263; *Springfield v. Walker*, 42 Ohio St., 543. It is difficult to imagine how more comprehensive terms could have been used to include every bridge over a waterway of the United States. That this bridge is within a civil division of the state is an undoubted fact; and so are all bridges in this country in some civil division of a state, except in those in the District of Columbia and in the territories, and most of them are built and controlled

by the authorities of such civil divisions. The capacity in which persons may exercise control, whether as agents, trustees, receivers, executors or otherwise ought not to exempt them from the consequences of maintaining a nuisance if they are persons having the power to make the alterations required by the War Department. To construe this statute as excluding the bridges under the control of municipalities, trustees of townships and county commissioners would practically defeat the purpose and beneficial effect of the act.

Here the discussion, so far as it bears upon the questions that are legitimately raised by the demurrer, is brought to a close.

The diversity of opinions in this case is, after all, in respect to matters that have little or no connection with the real issue. Take the question of the right of defendants to compensation for their bridge. Conceding that they have a legal right to compensation before they can be compelled to remove it, how does that question arise? It is not made in the petition. It does not appear that the defendants claim compensation or are entitled to any. The discussion of that question is, therefore, irrelevant. It is not quite accurate, however, to say that the act of Congress has been held, heretofore, to be unconstitutional, because it makes no provision for just compensation to parties entitled thereto. It has been held, rather, that the requirements of the secretary could not, in such case, be enforced by the imposition of the penalties provided by the act; and that the enforcement of it by penalties would be in violation of the Constitution. In other words, if the right to compensation is unjustly denied in a given case the owner of the bridge could not be charged with and convicted of the offense of willfully refusing to make the alterations; for that would be inflicting punishment for insistence upon the constitutional guaranty that private property shall not be taken for public use without just compensation.

Take as an example the able discussion of the abstract proposition that the Secretary of War can not compel nor can Congress authorize him to compel county commissioners to build bridges, dredge channels, straighten old channels or make new ones.

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What has the correctness of that proposition to do with this case? It is readily conceded that he can no more compel the defendants to do any of these things, than he can compel them to commit murder. Nor has he made an attempt to do so. Whatever compulsion may be enforced upon the defendants under this act, must be brought to bear by the District Court of the United States; and if not satisfactorily applied by that court a direct appeal may be taken to the Supreme Court.

Right here may be found the fundamental cause for divergency of opinions. Let it be admitted, as it must be, that county commissioners derive all their authority from the statutes of the state, and none from Congress or any department of the federal government, and we get back to the real question to be decided, whether the laws of Ohio authorized the defendants to do the things they are charged with intending to do.

No officers in the state have more ample discretionary power; and in the exercise of their judgment and discretion in matters within their jurisdiction they are not subject to the dictation or control of courts or tax-payers. While they keep within the limits of their jurisdiction they are practically omnipotent. They may remove bridges, piers and abutments and make any changes whatever so long as they act in good faith, and the expenditure does not exceed the statutory limit. Their failure to exercise good judgment and discretion does not authorize a proceeding of this character. If such were the law a large increase of the judicial force of the state might be demanded.

But for the general limitations as to expenditures the defendants might have removed the pier, abutment and fenders of this bridge and put up an entirely new structure without suggestions from the Secretary of War. The act of March, 1904, merely enlarged the limit of their expenditures in cases where a bridge over a navigable waterway was condemned or ordered removed by the War Department as an obstruction to navigation. Their authority to make this larger expenditure was complete when the order of the secretary in respect to this bridge was made; not because they were under compulsion to obey the order but

because the condition had happened, giving them the power to make such expenditure and their attempt thereupon to remove the old bridge with its fenders and piers and put in a new one was strictly within the express authority conferred by law. If this position is correct, then the claim that the defendants were intending to do more than was suggested by the secretary is also irrelevant. The pertinent inquiry is, were they intending to do more than they had authority to do under the laws of Ohio. If they were not, how could they be enjoined in this proceeding on the ground that their proposed action was in contravention of law?

The published opinion of my brother Cook is like a two-edged sword. It assaults the main fabric of the elaborate opinion of our distinguished associate, with intent to destroy, and then reaches the conclusion that the demurrer should be overruled on other, and possibly less tenable grounds.

It asserts that the demurrer admits that the bridge is no obstruction to the free navigation of the river, and hence "there was nothing for the secretary to base his order upon." This is a clear misapprehension of the contents of the petition. The petition alleges, "said bridge is not an unreasonable obstruction to navigation," thereby implying that it is some obstruction. It also avers, "if there is any difficulty in passing said bridge by the largest and longest boats, it is owing to the shape of the river and not to any fault in the bridge." This makes the implication clearer that navigation is impeded and difficult at this point. These allegations fall far short of making good the assertion that "the allegations of the petition show there was no obstruction." The unsoundness of the argument based upon such grounds is apparent, since it is immaterial what the petition declares in that respect. The authority of the commissioners under the statute is not made to depend upon the justness or propriety of the order of the War Department, but solely on the fact that it is made.

The invalidity of the order of the Secretary of War is asserted on the ground that he undertakes to direct the removal of the

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center pier which stands on land purchased by the county and directly outside the bounds of the river. The petition states that the center pier is on the east side of the river, "and entirely east of the established dock and harbor lines of said harbor," and that the bridge opening is "exactly over and substantially the entire width of the present and natural channel of the river."

These statements may be literally true and the pier yet stand within the bounds of the river. The reasonable inference from these guarded statements of the petition is, that it does. A portion of the order of the Secretary of War has been introduced into the majority opinion and from that we learn that, "the existence of the center pier and its fender in the river," is an obstruction to its free navigation. Although the order of the secretary declares they were so placed, the petition maintains a discreet silence on that point. The fenders consist of piling so driven as to protect the bridge, when open, against injury from passing boats. The petition says, "at the point said bridge crosses there is a bend in the river with its curve to the west.." From this statement there must be a bend of the river to the east both above and below the center pier, which would make it impossible for both ends of this straight bridge, when open, to coincide with the curvature of the stream. One end of it must necessarily lie to some extent over the river, and be protected in that position by fenders. The order of the secretary is that the opening shall be 140 feet between the fenders; thereby requiring the removal of the center pier more than twenty feet to the east, by reason of the bend in the stream; and thereby the pier and fenders would become useless obstructions, which the commissioners placed there and which they seem willing to remove. Whether the value of the piles and the stone in the pier would be more or less than the cost of their removal and clearing out the channel where they stand to the depth of the other parts of the channel is not shown.

If the commissioners chose to carry the center pier further to the east and thereby increase the length of the draw span,

or chose to make a new bridge of the jack-knife or lift pattern, as surmised and alleged, this would not contravene any law of the state, as the form and pattern of bridges and the location of piers and abutments are matters resting in the discretion of the commissioners. Besides, the act of 1904 expressly confers authority in such cases to purchase or appropriate land to widen such stream or streams.

The charge that the commissioners entered into an agreement, collusive or otherwise, with the Secretary of War with respect to removing or rebuilding this bridge is not supported by any allegation of the petition, nor was it hinted at in the argument of the case.

These suggestions as to the action of the secretary are made for the purpose of attempting to show that his order was neither arbitrary, illegal, nor unreasonable. Stripped of all irrelevant and collateral matters which have no proper place in the petition or in this discussion, the material facts stated in the petition are: that some seventeen years ago this bridge was built at a sharp curve in the river with a draw span sufficient to enable the ordinary vessels of that day to pass in safety; that since then the size of vessels has been greatly increased, until now it is well nigh impossible to warp them through the draw opening around the sharp curve; that upon the complaint of the railroad companies having extensive docks above the bridge, and upon their application and representations the War Department ordered certain alterations and changes to be made of which due notice was given to the commissioners; that said alterations and changes required the removal of the entire bridge structure, including the fenders and central pier, and the dredging of the channel at that point to the depth of twenty-one feet; and that in pursuance of said notice and the authority conferred upon them by the act of March, 1904, the defendants as county commissioners were proceeding to consummate said alterations and changes, without submitting the policy of the improvement to a vote of the people. The substantial grounds relied upon in the hearing of the case were, that said act of the Legislature was

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unconstitutional and that said act of Congress did not apply to county commissioners.

No member of this court holds said act of the Legislature to be unconstitutional; and only one member, if any, holds that the act of Congress does not apply to county commissioners. Section 18 of the act of Congress which has been drawn in question is held by the majority of the court to be constitutional; and yet the majority of the court hold that the commissioners were acting in contravention of law.

It is to be regretted that in reaching this conclusion it was found necessary to condemn an act of Congress, criticise an act of the General Assembly of Ohio, condemn the decisions of the federal courts, condemn the action of the Secretary of War, impute dishonest motives to the United States engineers, charge the county commissioners with fraud and collusion, as also the railroad companies, and impeach the intelligence of the counsel for the defendants. In justice to the attorneys it should be said that they were not guilty of the imputed absurdity of claiming that this was not a county bridge. Neither the defendants, the United States officers, nor the railroad companies owning docks above the bridge were shown to have been actuated, in what they did, by any baser motive than an honest desire to protect and improve the navigable channels of commerce. The serious consequences of this decision to the defendants and the public has induced this somewhat protracted dissenting opinion and the discussion of many irrelevant matters.

By the judgment in this case the execution of the laws of the United States is obstructed and temporarily thwarted, a necessary improvement upon which great public interests depend is delayed, and the defendants placed in a double jeopardy from which their escape may be problematic whatever course they pursue; and all this is done not in behalf of the enforcement of salutary laws according to their manifest letter and spirit, but against their proper enforcement, although the same have received, for more than half a century, either directly, or by analogy and upon principle, the sanction of the highest judicial tribunals in the land.

For these reasons I am forced to dissent from the judgment entered in this cause.

M. G. Spaulding and E. H. Starkey, for plaintiff in error.

White, Perry & Roberts and C. L. Taylor, for defendants in error.

**PROSPECTIVE PROFITS FROM THE DRILLING OF
AN OIL WELL.**

[Circuit Court of Wood County.]

GEORGE C. LEFFLER V. BISHOP WITTEN AND HERMAN A. SHULTZ.

Decided, November 25, 1905.

Breach of Contract—Measure of Damages—Where the Work Undertaken Consists Largely of the Labor of the Contractor—Prospective Profits—Hazard of the Enterprise—Verdict—Charge of Court.

1. The rule that prospective profits can not be recovered in a suit for breach of contract does not apply to a contract for the doing of work, which the contractor expects to perform himself in part with the expectation of getting good wages or of making something out of the job.
2. Where the contract relates to the drilling of an oil well, the plaintiff averring that he was not permitted to perform the work, a judgment for one-half of the amount claimed as the probable difference between the cost of the work and the amount to be paid therefor will not be disturbed, in view of the expenses to be incurred and the hazards of the work.

HAYNES, J. (orally); PARKER, J., and WILDMAN, J., concur.

The petition filed by Bishop Witten and Herman A. Shultz, partners, against George C. Leffler, in the common pleas court, sets forth that they entered into a contract with Leffler whereby among other things they agreed to drill an oil well on the property of Leffler. Leffler agreed to furnish the fuel necessary for the work of drilling, and agreed to erect and have ready for use a derrick for the location of the well to be drilled, and to have the derrick in readiness within five weeks from the date of the con-

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tract. Leffler agreed to pay the contract price, one-half in cash and the other half in four months from the completion and acceptance of the well, the plaintiffs agreeing to drill the well to a depth of four hundred feet in the sand or oil-bearing rock. The contract is in writing. The plaintiffs aver that at the expiration of said five weeks from the date of the contract they were ready and willing to drill the well and demanded of Leffler that he furnish the derrick and permit the plaintiffs to proceed with the drilling of the well according to the terms of the contract. The plaintiffs aver that they have done and performed all the things required of them on their part, but that the plaintiff, disregarding his contract and in violation of the same, did not erect and have ready the rig or derrick for the drilling of the well at the expiration of the five weeks, or at any time at all, and that defendant when requested to permit plaintiffs to drill said well, refused to let them do so, which they say was a damage to them in the sum of four hundred and ninety-five dollars, the difference between what they aver would be the expense of drilling the well, and the profits they expected to make.

The testimony of the plaintiffs was in regard to the breach of the contract and refusal on the part of the defendant, and the cost of that kind of work. They had already drilled one well on the property, and they called witnesses—experts, who were carrying on that kind of business, to show what the cost would be ordinarily for the completion of a well of that kind; and the defendant in cross-examination developed the fact that in the drilling of wells of that kind, there was a liability to various misadventures which would tend to render the drilling of the well uncertain and indefinite and that the prospective profits would be less followed up by the cost and expense of overcoming these defects. They have technical names for them in the prosecution of this business; sometimes it results in the loss of a string of tools, as it is called, and some testimony was developed in regard to the probability of that class of accidents, and statements made in regard to their experience. After this line of testimony had been given to the jury and the testimony on each side had been closed, the defendant requested the court in writing to charge the

jury as follows, which was refused, to which refusal the defendant excepted:

“The plaintiff can only recover on the first cause of action such damage as they actually sustained. They can not recover profits which they might have made if they had drilled the well.”

Thereupon the court proceeded to charge the jury very briefly indeed and says to them:

“If after a careful consideration of the evidence relating to this cause of action, you find in favor of the plaintiffs, they would be entitled to recover the contract price for drilling said well, less the actual cost of drilling the same. That is, they would be entitled to recover the profits which they would have made, had they been permitted to drill this well as provided by their contract.”

The controversy is in regard to the alleged returns of the contract, which on one side were called profits and on the other side is said to be a remuneration for their labor. It is not very material what they call it; it is what they expected to make out of the job. Counsel for plaintiff in error contend that they can not recover at all for profits, and they cite the general rule that where profits are uncertain they are mere profits, and that the court will not permit a recovery of that class of profits. That is very true in regard to a certain class of cases. We may say that this question of profit is one that is rather difficult in its application, and we find a great variety of cases upon the subject, some coming near to it, and some quite remote.

A case is cited by counsel for plaintiff in error found in 61 N. E. Rep., 561, where a man was carrying on a bicycle factory, and had everything that was necessary to make the wheels except the hubs, and he made some arrangement with the defendants to furnish them, which they failed to do. He was then sued for the value of certain things that had been furnished him, and he set up as a counter-claim the non-delivery of these hubs. He wanted to prove the profits he expected to make upon the bicycles, and the Supreme Court of Indiana held against him, under the general decisions in that class of cases. The court held “that the demurrer to the acknowledged claim should be sustained on the ground that the loss of profits on bicycles which the defendant

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might possibly have manufactured and sold can not be considered as damages arising naturally from the breach of the contract to deliver hub machines at the time fixed by the contract;" and holding further, "that speculative and contingent profits on probable sales can not be held to have been in contemplation of both parties at the time of the contract so as to render plaintiff liable therefor."

The case at bar is not exactly a case of manufactured articles. These men took a contract to do a certain piece of work, the work of drilling an oil well. They might do the whole thing by their own labor. What they expected to get was a remuneration for their labor and for the use of the machinery and tools, and for the labor they had to employ, and in all that they expect to get what may be termed a profit, or to make something out of it, or to make good wages for themselves and get something for the use of the machinery and tools. It comes in that way although it may be indefinite, and belongs to that large class of cases where contracts are taken to do work where there is an expectation of getting good wages or making something upon the contract.

We have been cited in this case by counsel for plaintiff in error to a case decided by our Supreme Court, *Rhodes v. Baird*, 16 O. S., 572. In that case there was a contract between the parties whereby the defendant Baird agreed to make a lease for a term of ten years for a piece of land for a peach orchard, and the breach consisted in the failure of the defendant to make the lease, and his causing the plaintiff, within two years after his taking possession, to be evicted from the premises, but after the peach trees were planted. On the trial the plaintiff was permitted to give evidence of the probable profits that might in future be realized from the orchard, judging by the number of crops and the prices of peaches in the county for the last ten or fifteen years, and it was held:

"1. The evidence as to the probably future profits was incompetent to be given in chief by the plaintiff, as furnishing a basis for the assessment of damages by the jury, such evidence being uncertain and speculative in its nature, and in a great degree conjectural.

“2. To the extent that the damage depended on the loss of the property for the term, its market value at the time of the eviction subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value, its value should be ascertained from witnesses whose skill and experience enable them to testify to such value in view of the hazards and chances of the business to which the land was to be devoted.”

It will be seen that while the profits may be uncertain, yet in that case the court recognized the fact that the parties should have damages for the breach of the contract. But the court held that they should have called what might be termed expert witnesses to show, first, whether there was a market value of a lease of that kind; if it had no general market value, its value should have been ascertained from witnesses whose skill and experience enabled them to testify directly to such value, in view of the hazards and chances of the business to which the orchard was subject. After all, it will be seen, without calling witnesses, the question comes right back to the chances and hazards of the business of peach growing; that is to say, the probability of their having a crop every year, or of losing many crops during the term, and all the various incidents and hazards attending the cultivation of a peach orchard.

We had a case in this circuit which was decided in 1891 by this court, Judge Moore taking the place of Judge Scribner. It was the case of *The City of Toledo v. Libbie*, 19 C. C. R., 704, wherein a man took a contract for building sidewalks and he expected to make a certain profit out of the work. He expected to do the work and get a certain sum for his labor and make a certain profit on the materials that went into the construction—get an ample compensation out of the two; that after he had partially entered into the performance of his contract, the city council stopped further construction and prohibited him from further pursuing his contract, and the court in that case held:

“In an action by a contractor against a city for damages for having prevented such contractor from performing or completing his contract, the plaintiff would be entitled to recover the difference between the contract price and what it would have actually

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cost to have completed the contract; in other words, the profit he would have made.

“Where therefore the contractor has taken the contract at less than it was worth to do the latter, it would be error in the court to permit him to offer evidence to prove what it was reasonably worth to do the labor; it would be error in the court to permit him to offer evidence to prove what it was reasonably worth to do the work. If the contractor took the contract at a price at which there was no profit in it, he lost nothing by the action of the city abandoning the contract, and he can recover nothing; but if his contract price was in excess of what it would be worth to complete the work, that would be the measure of damages.”

That case was affirmed by the Supreme Court in 51 O. S., 562.

This case at bar lies along the line of that class of cases. The testimony is not so full and complete perhaps as I would like to have seen it, speaking for myself, but there was testimony on all of those points, and there was a charge of the court. The court's charge is short and brief, and there was a denial prayed for by the plaintiff in error, but we are of the opinion, taking the whole of the testimony together in the case and its application, that the charge of the court should be sustained.

It is shown by the record that the jury in its verdict returned on this point in the petition about two hundred and fifty dollars, or about half of the claim of the plaintiffs' below, and it is evident that they took into consideration the cost of doing the work, its hazards and probabilities. That is all that the Supreme Court of this state requires in regard to anything. Taking all the probabilities into consideration in this case, the jury reduced the claim of the plaintiffs about one half, and it looks to us as if that deduction was proper and right. This party made a contract and broke it, and he should pay such damages as would, in the judgment of the jury, result from a breach of the contract, and the judgment of the court of common pleas will be affirmed, without penalty.

W. H. McMillen, Jas. O. Troup, for plaintiffs in error.

Baldwin & Harrington, for defendant in error.

EQUITIES IN CONNECTION WITH SPECIFIC PERFORMANCE.

[Circuit Court of Hamilton County.]

CAREY & ZIMMERMAN v. ARTHUR P. TAYLOR.

Decided, June 2, 1906.

Specific Performance—Of Contract for Purchase of Real Estate—Interest on Purchase Money—Pending Perfection of Title—Purchaser in Possession—Rents and Profits.

Where a purchaser of real estate goes into possession, and enjoys the rents and profits during¹ a period of several months while the title is being perfected, he is liable for interest on the purchase money from the time of going into possession until the delivery of the deed.

GIFFEN, J.; JELKE, J., and SWING, J., concur.

This is an action for the specific performance of a contract to purchase certain real estate, entered into January 20, 1905, by the terms of which plaintiff was to pay one thousand dollars cash on February 10, 1905, and the balance, partly by assuming a mortgage then on the property, and partly by a second mortgage for such sum as would bring the total up to forty-two hundred dollars.

The contract contained the clause: "The property to be conveyed to me by general warranty deed with release of dower, title of property to be good."

An examination of the title disclosed a substantial defect, which was reported to plaintiffs, but on February 10, 1905, defendant took possession of the premises with the understanding that the defect would be cured, but without any agreement to pay rent or interest on the purchase money in the meantime. The title was not perfected nor was the deed tendered until September 22, 1905, when interest was demanded upon the purchase money from February 10, 1905. The defendant denies the right of plaintiffs to such interest and avers that on February 10, 1905, and until September 22, 1905, he was ready and will-

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ing and anxious to perform his part of said agreement whenever plaintiffs would tender him a proper warranty deed and title to said premises.

The question presented is whether a purchaser in possession of the premises is chargeable with interest on the purchase money during the period of time from the date when the contract was to be completed and the actual tender of the deed, the delay being occasioned by the failure of the vendor to perfect the title. When defendant avers that he was always ready and willing to perform his part of the contract, it does not appear that such fact was communicated to the plaintiffs, nor that he offered to perform. Plaintiffs were, therefore, not in default to the extent that defendant could have brought an action for specific performance. *Roudebaugh v. Hart*, 61 O. S., 73.

When the defendant was put in possession of the premises, the plaintiffs did all they could at that time do in fulfillment of the contract, and it was evidently the intention of the parties to complete the contract when the defect in the title was cured. In the meantime, the defendant suffered loss, if at all, only in interest on the one thousand dollars, but it does not appear from the pleadings that he even sustained this loss. The thousand dollars may have been earning interest during the entire period, or, if not, it was his duty to deposit it in bank, and notify the plaintiffs that this money together with such interest as the bank might allow, would be subject to their order upon a tender of a good and sufficient deed. In the event that such deed could not be tendered, or the defect in the title could not be removed, and the defendant was, therefore, compelled to surrender possession of the premises, he would not be liable for rent during the time he occupied the same, as the relation of landlord and tenant did not exist.

In Pomeroy on "Specific Performance of Contracts," Sections 429 and 430, are as follows:

"The general rule is well settled that, where the contract is not completed until after the time stipulated for that purpose, but the court nevertheless decrees a specific performance, it will adjust the equities of the parties by placing them as far as

possible in the same position which they would have occupied had the agreement been completed at the prescribed day, and to that end it will allow to the purchaser the rents and profits, and to the vendor interest upon the purchase price from and after that date.

“In ordinary contracts, which contain no stipulation concerning the payment of interest, and do not specify any day for completion, the purchaser is generally liable to pay interest on the purchase money from the time when he takes the possession, especially if he has received the rents and profits.”

To the same effect is Dart on “Vendors and Purchasers,” at page 627, and following.

The reason of the rule seems to be that a party to the sale of real estate can not have the rents and profits and also the use of the purchase money, the object being to place the parties in a position as near as possible to that which they would have occupied had the contract been completed at the date agreed on.

The demurrer to the answer will be sustained.

W. M. Fridman, for plaintiffs.

Malcolm McAvoy, contra.

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RECOVERY FOR DEATH UNDER AN ACCIDENT POLICY.

[Circuit Court of Lucas County.]

THE TRAVELERS INSURANCE COMPANY v. ANNA M. LEIBUS.

Decided, May, 1906.

Accident Insurance—Pleading in Action for Recovery for Death—Proximate and Sole Cause—Error not Affecting Substantial Rights—Incorrect Answer of Insured as to Weekly Earnings—Charge of Court—Burden of Proof—Words and Phrases.

1. In an action for recovery for death under a policy of accident insurance, containing the provision that the company insures against death resulting from injuries alone, the judgment against the company will not be reversed for failure to allege in the petition that death was caused solely by the accident, where the answer affirmatively alleged another cause, thereby presenting that issue.
2. Where in such a case the court charged the jury generally that the plaintiff must show that death resulted from the accident alone, and also charged that the burden was on the defendant to show the specific cause of death to have been other than the accident, the apparent inconsistency is not of such a character as to require a reversal of the judgment.
3. Nor did the use of the word "proximate" cause of death in the sense of "sole" cause, when taken in connection with other qualifying and restrictive words in the same connection, render the instruction confusing or erroneous to an extent requiring a reversal of the judgment.
4. A clause availing a policy of accident insurance for a false or incorrect statement of the weekly earnings of the assured, is applicable only to the weekly indemnity to which the assured would be entitled in case of an injury which incapacitates him from following his vocation, and not to an injury resulting in death.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding brought in error to reverse the judgment of the court of common pleas in favor of the defendant in error, Anna M. Leibus, against the said insurance company.

It appears from the pleadings and record that one August Leibus, who was insured in the Travelers Insurance Company, died on the 2d day of April, 1904, as the claimed result of an accident incurred by him in falling a short time previous to that date. Suit was brought by the beneficiary, Anna M. Leibus,

in the court below, and a verdict and judgment for the sum of \$5,000 obtained upon the policy of insurance.

There are several claims of error upon which the proceeding is prosecuted in this court to reverse that judgment. The record is a somewhat long one, and a critical examination of all the points involved and statement of the reasons for the conclusion at which we have arrived upon each claimed item of error would take longer time than I have now at my disposal and would hardly be necessary to a correct understanding of our general conclusions.

One of the important claims of the plaintiff in error is that the petition of Mrs. Leibus in the court below did not state facts constituting a cause of action, and for that reason was obnoxious to the demurrer which was filed against it, and that the court erred in overruling said demurrer. The point most specifically stated is that the petition failed to allege in express terms that death had occurred *alone* from the accident described in the petition, and in an amendment to it, which in some detail stated the occurrence averred to have caused the death. It is not claimed that the petition does not sufficiently allege the death as the proximate result of the accident, but it is claimed that it nowhere alleges that it was caused *solely* by the accident, and that it should have so alleged.

We are strongly inclined to the opinion that the petition is open to this objection, but, under a decision of the Supreme Court and one or two general provisions of our civil code to which I will presently refer, our view is that this, under all the circumstances of the case, is not ground for reversal.

The policy of insurance not only contains the general provision that the company insures the decedent against death resulting from the injuries alone, but it has an independent clause providing that the insurance shall not cover injuries resulting wholly or partly, directly or indirectly, from a number of causes mentioned in the clause of the policy referred to, among which is cited disease in any form. This was set up in a defense in the answer in the case at bar as a ground upon which the company was exonerated from liability, or rather, a ground for the claim that the policy did not cover the death in this case

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because, as asserted, it had resulted from a disease of some kind.

The decision of the Supreme Court to which I referred is the case of *Yocum, Admr., v. Allen*, 58 O. S., 280, holding—

“Where, in a cause pending in the court of common pleas, a demurrer to a petition has been overruled, and upon issues made by answer and reply, the case has been tried to a jury and a verdict and judgment for plaintiff rendered, this court will not reverse the judgment, even though satisfied that the demurrer ought to have been sustained, provided it also appears, upon a consideration of the whole record, that the overruling of the demurrer was an error which was not prejudicial to the adverse party.”

This decision of the Supreme Court is based upon the provision of our civil code to which I have referred, or perhaps to two provisions of the civil code, which are referred to on pages 288 and 289 of the case cited.

“Respecting the defects in the petition,” the court said, “as to allegations of indebtedness, the writer is free to say” (and the writer in this instance is Judge Spear) “that he has no sufficient answer to the criticism of counsel, and if we were passing upon the question in a court of first instance, there would seem to be evident propriety in holding the pleading insufficient. But the question before this court is not whether this petition, tested by technical rules, states a case, but whether the error in overruling the demurrer has worked prejudice to the adverse party which requires a reversal of the judgment. The second section of the code (now 4948), enjoined this rule upon the courts: ‘The provisions of this part, and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice.’ And Section 138 (now 5115), enjoins a still further duty in the direction of liberality: ‘The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect.’ ”

The petition in that case defectively stated the claims of the plaintiff. It was probably obnoxious to a demurrer upon the ground that the petition did not state facts constituting a cause of action, but notwithstanding another provision in the code, that the defendant shall be deemed to have waived all defects in the

petition which might be raised by demurrer save only that the petition does not state facts constituting a cause of action, or that the court has no jurisdiction, the Supreme Court, applying the other provision of the code that the court in every such action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, refused to reverse the judgment notwithstanding the defective petition.

In the case at bar we have a condition very similar to the one, which upon a reading of the facts in *Yocum v. Allen*, will be found to have obtained in that case. The precise matter was called to the attention of the court and jury upon the trial of the case by the claims made in the answer after the demurrer had been overruled by the court; because the answer affirmatively alleged independent causes of the death, so as to show affirmatively by the defendant what the plaintiff had failed to negative, that the death had another cause than the accident. We think, on the strength of the decision in the 58th Ohio State, that this judgment ought not to be reversed upon the ground that the petition was defective in failing to state that the death was caused solely by the accident.

Another point made in the petition in error before us is that the court erroneously sustained a demurrer to the second defense in the defendant's answer pleading a false or incorrect statement of the assured as to his weekly earnings, and a clause avoiding the policy for such representations. Without pausing long upon this, it is enough to say that we think that this demurrer was properly sustained; that the clause in the policy upon which the defense was based was applicable only to the weekly indemnity which the policy provided for in case of injury to the person assured, and that it had no application to a case of death.

The plaintiff in error claims that the court erred in the admission and rejection of certain evidence during the progress of the case, and if I had time I would comment in detail upon the various rulings of the court in this regard as shown by the bill of exceptions. We have examined it, and especially the pages cited by counsel for the plaintiff in error, but we find upon none of those pages, or elsewhere in the record, any rulings of the court

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that in our judgment would justify a reversal of the case upon either ground stated, the admission or the rejection of evidence, or other rulings during the progress of the trial, up to the time of the charge of the court to the jury, wherein some quite important questions are raised which demand a little more special attention.

It is urged by counsel for plaintiff in error that the court erred in charging the jury as the court did, substantially, that the burden was upon the defendant to show a specific cause for the death other than the accident. Did the court err in this respect? The court had already charged generally that the plaintiff must show that the death resulted alone from the accident; but later, and notwithstanding that, the court instructed the jury that upon the particular claims made by the defendant as to specific causes of death other than the accident, the burden was on the defendant to show them. This question we have examined with a good deal of care, and with the impression at first that perhaps the court committed substantial error in the charge so given.

In *Freeman v. Travelers' Insurance Company*, 144 Massachusetts, 572, it was held:

“In an action upon a policy of insurance against bodily injuries ‘effected through external, violent, and accidental means, within the meaning of this contract and the conditions hereunto annexed,’ one of which is that ‘the party insured is required to use all due diligence for personal safety and protection,’ the burden of proof is on the defendant to show that the assured did not use such due diligence.”

I will not stop to quote further from this case.

On page 77 of 154 Massachusetts is the case of *Badenfeld v. Massachusetts Mutual Accident Association*, in which it is held that in an action upon a certificate of membership in an accident association containing provisions that “members are required to use all due diligence for personal safety and protection,” and that no claim shall be made upon the certificate “when death or injury may have happened in consequence of any voluntary exposure to unnecessary danger,” the burden of proof is on the defendant to show that the assured did not use such due dili-

gence, or that he did thus expose himself to such danger. I will pass this decision also without further comment.

In *Moody v. Insurance Company*, 52 Ohio State, 12, it was held:

“The conditions precedent, performance of which the plaintiff is required to plead in an action on such a policy, include only those affirmative acts which are necessary in order to perfect his right of action on the policy, and, it may be, other acts of like nature. Conditions which provide that the policy shall become void, or inoperative, or the insurer relieved wholly or partially from liability, upon the happening of some event, or doing, or omission to do some act, are matters of defense, and to be available must be pleaded, and their breach alleged.”

This in itself is not quite pertinent to the case at bar, but I cite it as in line with some later decisions which are in harmony with it in principle and which approach perhaps more closely the precise question which we have here. There are some authorities cited in the argument of counsel in the 52d Ohio State, which should be read and considered in connection with the question here.

In the 56th Ohio State is the case of *U. S. Mutual Accident Association v. Hubbell*, page 516. Here it is held that death caused by accidental drowning is death through external, violent and accidental means within the meaning of the stipulation of an accident policy which gives indemnity against death by such means. Passing from the syllabus to the statement of the case on page 517, we have this fact, as to the pleadings, given:

“The answer set up that a condition of each of the policies was that the ‘contract shall not extend to or cover voluntary exposure to unnecessary danger.’ ” * * *

On page 526 of the case cited, Judge Spear, speaking for the court, says:

“It being thus sufficiently shown by the evidence of the plaintiff, that the assured came to his death within the general terms of the policy, the burden rested upon the company to prove that a recovery was defeated by reason of the exception pleaded, viz., that death was the result of ‘voluntary exposure to unnecessary danger.’ ”

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I will come back to this case a little later.

In the 68th Ohio State, 151, is the case of *Aetna Life Insurance Company v. Dorney*, a case cited by counsel during argument. In the second syllabus of the case I read:

“If a policy of insurance against accident contains a stipulation that the insurer shall not be liable on account of the death of the assured if it results wholly or partly from infirmity or disease, the stipulation is available as a defense notwithstanding Sections 3625 and 3626, Revised Statutes, whose effect is limited to defenses founded on fraud or misstatement in the application.”

The court refused an instruction which the defendant requested, and which the Supreme Court held was erroneously refused. It is this:

“Fourth. If you find from the facts and circumstances proved that the coats of the stomach of said George S. Dorney had been eaten through by an ulcer and was left in a weakened and diseased condition, and that but for such disease and weakened condition of his stomach the injury which caused his death would not have resulted from anything he did on the 23d day of October, 1899, then and in that case the plaintiff can not recover and your verdict must be for the defendant.”

The court held as above stated that the instruction was pertinent and should have been given. It will be observed that the language is not “If you fail to find that he was not diseased,” but “If you find from the facts and circumstances proved.” Of course this is not determinative of the question as to whether it is necessary to allege as a defense or prove that the person was afflicted with a disease which caused the death, but it hints in that direction, and taken in connection with the language in the syllabus itself that it is available as a defense, it seems to us that it is an indication of the understanding by the Supreme Court as to where the burden would rest.

I said that I would return to the case in the 56th Ohio State, and I do so to examine the rule therein given in connection with the language of the policy in the case at bar. This defense as made by the defendant is under the fifth clause of the policy, and I read the part of it which is pertinent to the question which we are considering:

“This insurance shall not cover death resulting wholly or partly, directly or indirectly, from * * * disease in any form, nor shall this insurance cover accident, injuries, disability, or death, resulting directly or indirectly from voluntary over-exertion, or from voluntary exposure to unnecessary danger.”

It is a continuation of the same paragraph, and it is a use of the precise language that we find in the policy in reference to disease in any form and voluntary exposure to any danger. In other words, the policy does not cover death resulting from disease in any form, nor does it cover death resulting from voluntary exposure to unnecessary danger. I call especial attention to this, because the precise point decided in the 56th Ohio State case, *supra*, is that “voluntary exposure to unnecessary danger,” was a matter with regard to which the burden rested upon the company. If that is true as to that specific cause of death, it would seem equally true as to disease, that is, any special disease, upon which the defendant relied to defeat a recovery.

It is a very difficult thing to harmonize an instruction on the one hand, that the plaintiff must show that the death was caused *alone* by accident with another that as to any specific cause of death which with the accident contributes to it, the burden is on the defendant to point out its claim in that regard and to establish them by proof, and yet we have analogous cases in practice.

In this case, although the plaintiff is required to allege in general terms matter which entitles him to the relief sought, when it comes to specific matters it is incumbent upon the defendant to make the allegations and proof, to point out specifically wherein the plaintiff is not entitled to recover. To illustrate: In this policy, the fifth clause, in addition to the possible causes of death already quoted, provides that the insurance shall not cover death or disability resulting wholly or partly, directly or indirectly, from intoxication, or while intoxicated, or from or while violating law, or from hernia, or from bites or stings of insects. It will hardly be claimed that it is incumbent upon the plaintiff either to allege or prove that he had not been bitten or stung by an insect, that he was not intoxicated at the time of the injury, and if so, it was not incumbent upon him to show that the walls of his arteries had not become impaired by disease. In

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other words, he was not required to prove that he was not afflicted with any particular disease. It may have been incumbent upon him to trace his death to the injury as a direct sequence, and we are somewhat inclined to hold that having done this he has made a *prima facie* case. It may have been necessary for him to show in a general way that he was in health, but it was not incumbent upon him to prove that his death was not due to his being intoxicated, or to any of these other specific things to which I have referred. The Supreme Court has held that it was not incumbent upon him to show that his death was not caused by involuntary exposure to unnecessary danger, mention of which we find in this same clause, but that it was incumbent upon the defendant to prove that his death was caused by such fact.

The judge below attempted to draw this distinction, and it was a pretty difficult and a pretty fine distinction to draw. It was accomplished with difficulty and in some places it seems as if the judge had come pretty close to the line between correctness and error, but we are inclined to think upon the whole that he accomplished his difficult task with reasonable accuracy and correctness, and that, with the aid of some definitions that he gave and responses to instructions asked by the defendant as well as the plaintiff, he relieved the case from any possible prejudice to the defendant from his general instructions.

It is said that the court below confused the word "proximate" with the word "sole"; that he used the two words as synonymous, and it looks to us as if he had done so. In fact, in one part of the charge he almost expressly says that the word "proximate" is to be treated as equivalent to the word "sole" or synonymous with it. But the fact that he did so treat these words in itself, in our judgment, took away whatever injurious effect there was in some of the instructions that he gave as to the plaintiff being entitled to recover if the death was proximately caused by the injury, because he defined it substantially as meaning "solely" caused by the injury. He had made it perhaps reasonably clear in the first instructions that he gave at the request of the parties and in the general charge. But to avoid any possible cloud upon the charge, to take away whatever danger there might be to the defendant, counsel for the defendant properly attempted

to guard the jury from any difficulty of understanding what the court was trying to tell them. This was at the conclusion of the charge and before the case was finally submitted. A request had been made for certain special findings of the jury, answers to interrogatories, the fourth of which was: "Was the injury the proximate cause of his death?"

It was essential that the injury should be the proximate cause of the death, as well as that the matter should not be complicated by other cause such as was specified in the policy as exonerating the company from liability, so that the interrogatory was proper enough, and the use of the word "proximate" in that request, in the interrogatory, was a correct one. The court had stated to the jury substantially that it was necessary that it should be the proximate cause, the only trouble in that respect with his charge being that he had also said that he used the word as equivalent to "sole." The defendant's counsel asked the court as follows, at the same time objecting to this interrogatory:

"Before the jury retires I want to note an objection to the special findings, especially the last, to see that that is not put before the jury so as to confuse them and lead to wrong results. 'Was the injury the proximate cause of his death?' The jury ought to be charged that the court is using the term 'proximate' meaning the sole cause, independent of all other causes.

"THE COURT: That is correct. Gentlemen of the jury, the proximate cause of the death in the meaning of this contract is the sole cause of the death, as I have used that term in my instructions."

As I have already said, the words "proximate" and "sole" are not synonymous. As a matter of law we can not so consider them. But it was not necessary that this jury should be taught law any further than was necessary for their consideration of this case. The court gave them an instruction which was legally and abstractly erroneous, yet at the same time he instructed them as to just how it was to be applied, and no prejudice resulted if the application was correct. In other words, if he said to the jury that the injury must be the proximate cause of the death and at the same time, but in another part of his charge or instruction, at the request of counsel, told them that he

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meant by that that it must be the sole cause of death, then he was telling them precisely what counsel for defendant was claiming all through the case to be the law that the injury must be the sole cause of death, and that the court had repeatedly in substance told them in other phraseology. And although he had told them that it was incumbent upon the defendant to show a particular disease, or that he was diseased, he had never departed from the proposition with which he started out, that as an ultimate fact the death must have been caused solely, or, as he expressed it "proximately," meaning the same thing, by the injury. The jury then were instructed in substance that if the contention of fact which the defendant was making was true, that some other cause than the falling on the sidewalk contributed independently to the unfortunate result, the death of the man injured, then the plaintiff, the beneficiary, was not entitled to recover. And that is the substance of the whole case, the gist of the whole contention.

And we have concluded after a very careful consideration of the case and study of it in all its aspects, that the judgment of the court below upon the verdict should not be disturbed. We think that substantial justice was done, that the defendant has had a fair trial. Nor are we inclined to disturb the verdict upon the ground that it is contrary to the evidence. There was a conflict of evidence, a number of experts testified on both sides, about as many upon one side as upon the other; and remembering that to establish any particular latent disease, the onus was upon defendant, we think that the jury was fairly justified in arriving at the conclusion to which they came that the plaintiff was entitled to the verdict sought. And with these views the judgment of the court below will be affirmed.

Doyle, Lewis & Schaufelberger, for plaintiff in error.

Potter & Potter, for defendant in error.

POWER TO PUNISH FOR CONTEMPT.

[Circuit Court of Hamilton County.]

EX PARTE FROOME MORRIS.

Decided, June 8, 1906.

Contempt—By an Assistant Prosecuting Attorney—In Refusing to Enter a Nolle—Not Punishable Summarily—Procedure in Contempt—Jurisdiction—Sections 1265, 5639 and 5641—Habeas Corpus.

1. An assistant prosecuting attorney is not amenable to a charge of contempt for refusing to obey an order of court to prepare and present a *nolle prosequi* in a specified case. Such an order should be directed to the prosecuting attorney.
2. The circuit court has jurisdiction in habeas corpus in the case of one committed for contempt by a common pleas judge who was without jurisdiction in the premises.
3. While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power but simply points out the manner in which it shall be exercised.
4. Resistance to a command of court to enter a *nolle prosequi* in a certain case is not punishable summarily but only under the procedure provided in Section 5641, and unless that procedure as to the filing of written charges, etc., is conformed with, a court is without jurisdiction to punish for a contempt thus committed.

SWING, J.; JELKE, J., and GIFFEN, J., concur.

This is an action in this court in habeas corpus. In the case of *The State of Ohio v. William Utz*, said Utz was tried in the court of common pleas and a verdict of guilty was rendered by the jury. A motion for a new trial was filed, which motion the court granted, as shown by the following entry:

“This day came the prosecuting attorney, on behalf of the state of Ohio, the defendant being brought into court in custody of the sheriff, his counsel also appearing. And this cause coming on to be heard upon the motion for a new trial, the court after full consideration and being fully advised in the premises. the court grants the motion for a new trial, and the verdict heretofore entered herein is set aside and held for naught. It is further ordered that a *nolle prosequi* be entered in this cause, and the defendant is discharged from further answering to the indictment filed in this court against him.”

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Then follows the following entry:

“It appearing to the court that in this case the court upon consideration of this motion for a new trial from the evidence overwhelmingly in favor of the prisoner, granted said motion, and in view of the fact that the defendant established an alibi by a great preponderance of the evidence, directed and commanded Mr. Froome Morris, the assistant prosecuting attorney of this court, to draw in form a *nolle prosequi*; that said assistant prosecuting attorney thereupon retired in the forenoon and without having produced said *nolle*, the court again called for said form, to which Mr. Morris did not respond; that thereafter the court again called for Mr. Morris and he responded, declining to produce or draw said *nolle* on the ground that the court had no authority so to do, and that he as assistant prosecuting attorney had no authority so to do. He also admitted in open court that he summoned the reporters of the papers, stating to them that if he found the court was wrong he would refuse to comply with the court's order. All this having been done in open court and in the presence of the judge presiding in said room, the court again cautioned Mr. Morris that it would be a contempt if he failed to obey the court's order, and said Morris again refusing to obey said order, unless the court put it in the form of a request instead of a command or order, and after consulting Hiram Rulison, the Prosecuting Attorney, who was willing that a *nolle* be entered, said Morris again refusing to draw said form, the court thereupon found said Froome Morris guilty of a willful contempt and disobedience to the order of said court, and ordered that he pay a fine of one hundred dollars to be paid into the county treasury, and that he be committed until such fine is paid, to all of which Mr. Froome Morris objected and excepted.

“And the Sheriff of Hamilton County, Ohio, is hereby ordered to take the said Froome Morris into custody, he having refused to pay said fine into court, and that he be confined until said sum is paid or he be otherwise discharged by law.”

The entry recites that Froome Morris is the “assistant prosecuting attorney of this court” and that Hiram Rulison is the prosecuting attorney. It does not appear from the record in the case of *Ohio v. Utz* that said Morris had anything to do with the trial of that case. On the contrary, the record discloses that the case was prosecuted by the prosecuting attorney, but we think it is fair to presume that Froome Morris at least assisted in the prosecution and was so engaged at the time the judge found him guilty of contempt.

We think the court is justified in construing the order of the court to be one directing Froome Morris to furnish an entry as prosecuting attorney to nolle the indictment. It can not be that the judge was directing said Morris to furnish a form of a *nolle*, and that said Morris refused this kind of an order; this would be such a trifling matter that we can not conceive that either the judge or said Morris would enter into it, besides a fair construction of the order excludes any such construction. In effect then the order of the judge was a punishment for a contempt of Morris as prosecuting attorney in not presenting to the court a *nolle prosequi* of the indictment against Utz. Whether or not the judge would be justified in this case in making such an order on the prosecuting attorney is not here for determination, but we think it evident, if he had such power, it must be directed to the prosecuting attorney himself, and not to an assistant prosecuting attorney. The assistant prosecuting attorney certainly would not, without first being authorized by the prosecuting attorney, ask the court to enter a *nolle prosequi* in a case. The statute points out that the prosecuting attorney may by consent of the court enter a *nolle prosequi*. Section 1275 is as follows:

“[*Nolle prosequi not valid unless entered by leave of the court.*] The prosecuting attorney shall not enter a *nolle prosequi* in any cause, without leave of the court, on good cause shown, in open court; and any *nolle prosequi* entered contrary to this section shall be invalid.”

We are therefore of the opinion that the judge was not justified in ordering the said Morris to enter the order in question.

Possibly we are not called upon to make this holding from the record in this case, but are of opinion that it should be done in view of what may arise in the case.

The main question in the case is whether this court has jurisdiction in habeas corpus, and that, we think, depends on whether the judge had jurisdiction to punish Morris as for a contempt upon the facts as disclosed by the record. Our statute, commencing with Section 5639, Revised Statutes, provides for punishments for contempts of court. While it is evident that courts do not derive their power to punish for contempts from the statute, as such power must exist from necessity, for without it courts could not hear and decide cases or enforce

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their judgments when rendered, and therefore any law passed by the Legislature which would in a substantial manner abridge this power would be invalid, we are of opinion, however, that our statute does not abridge this power of the courts. It simply points out the manner in which this power shall be exercised and to this we think the courts should conform; and in conforming to these provisions, we think the court is aided rather than hindered. They seem to us wise and reasonable, and should be followed in such proceedings.

Section 5639. Revised Statutes, is as follows:

“[*What contempts may be punished summarily.*] A court, or judge at chambers, may punish, summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.”

The record shows that Morris was not obstructing the administration of justice, and therefore could not be adjudged guilty of contempt and punished under this section. He was ordered to furnish a *nolle prosequi* in the case of *Ohio v. Utz*, and refused to do it; if guilty of a contempt in refusing to obey this order of the court, it came under the first provision of Section 5640, Revised Statutes, which is as follows: “Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;” and if under this section, by Section 5641, Revised Statutes, which is as follows:

“[*When accused entitled to be heard.*] In cases under the last section, a charge in writing shall be filed with the clerk, an entry thereof made upon the journal, and an opportunity given the accused to be heard, by himself or counsel; but this section shall not be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody, pending such proceedings.”

Morris was entitled to be heard before the court upon written charges. And this was not done. The decision of the court on the hearing on the written charges is what the court is authorized to punish as for a contempt, and without such charge in writing the court had no jurisdiction to punish for contempt.

We therefore hold that we have jurisdiction in this case, and that the prisoner should be discharged.

H. M. Rulison, L. B. Sawyer, E. M. Ballard and Froome Morris, for the petitioner.

Frank F. Dinsmore and Wm. L. Dickson, contra.

RECOVERY OF MONEY PAID ON ILLEGAL BRIDGE CONTRACTS.

[Circuit Court of Sandusky County.]

THE STATE OF OHIO, EX REL M. W. HUNT, PROSECUTING ATTORNEY, v. S. M. FRONIZER ET AL.

Decided, May 19, 1906.

Actions—For Recovery of Money Wrongfully paid out of County Treasury—Section 1277—Empowering Prosecuting Attorney to Bring Suit—Auditor's Certificate that Money is in Treasury to Meet Contract—Failure to Comply with Requirement of Section 2834b with Reference to—Res Judicata—Voluntary Payment—Equitable Defenses.

1. Section 1277, Revised Statutes, as amended April 25, 1898, authorizing the prosecuting attorney to institute actions in the name of the state to recover back for the use of the county public moneys misapplied, withheld from, or illegally drawn out of the county treasury, or to recover for the benefit of the county damages resulting from illegal contracts, does not give to the public when thus represented by the prosecutor a new and different cause of action from any theretofore existing in its favor, but merely confers upon the prosecuting attorney authority to represent the public in suits upon causes of action which are not created by the statute and are not new. *State, ex rel Schwartz, v. Zumstein et al*, 4 C. C., 268, and *Jones, Auditor, v. Commissioners of Lucas County*, 11 C. C., 136, followed and approved; *Jones, Auditor, v. Commissioners of Lucas County*, 57 O. S., 189, doubted; *Buchanan Bridge Co. v. Campbell et al*, 60 O. S., 406, and *Vindicator Printing Co. v. State*, 68 O. S., 362, distinguished.
2. Moreover, this statute does not so operate upon causes of action as to change their nature, or remove any infirmities or conditions that may attach to them, or any defenses that may be interposed to them, such as *res judicata* or voluntary payment.
3. While a prosecuting attorney is empowered under this statute to institute an action for recovery of money paid for a bridge under an

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illegal contract, recovery of the whole amount paid will not be permitted unless a willingness is exhibited to relinquish any claim of the county to the bridge.

4. Where the facts pleaded show good faith in all that was done, failure through inadvertance to file an auditor's certificate that the money needed to carry out the contract is in the treasury, as required by Section 2834b, does not necessarily render the contract so void that no rights or liabilities can grow out of the transaction; but where the contract has been repudiated, and there is no fraud claimed, and effort is being made to place the parties as nearly as possible in *statu quo*, the effort should be forwarded by the courts.

*Affirming, *State, ex rel Hunt, v. Fronizer et al*, 3 N. P.—N. S., 303.

Points from brief of Basil Meek, of counsel for plaintiff in error:

For a statement of the facts in this action, reference is made to 3 N. P.—N. S., 303.

The question in this case is whether or not Section 1277, Revised Statutes, 1880, as amended in 1898 (93 O. L., 408), authorizes the recovery back by the prosecuting attorney of money paid on county commissioners' bridge contracts, void under Section 2834b, Revised Statutes, for the lack of the county auditor's certificate as therein required without first offering to return to the contractors the bridge structures erected by them and accepted by the county commissioners under such void contracts? The contention in other respects was decided in the common pleas court in favor of the plaintiff.

Prior to the amendment of 1898 payment on such void contracts, where they were not completed, could be perpetually enjoined, but if the injury had already been done by the completion of the contract and the payment of the money, the public was without remedy. On the other hand, if payment was so enjoined, no action could be maintained by the contractors for the recovery of the value or any part of it, of such bridge structure.

The case of *The Buchanan Bridge Co. v. Campbell et al*, 60 O. S., 406, is in point, and was one where a contract for bridge material was made in 1894, in disregard of the statutory requirements. The material had been furnished to completion, accepted by the commissioners *and in use by the public*. Payment of the contract price being perpetually enjoined, an action

was brought to recover the fair value of such material. The Supreme Court held:

“A contract made by the county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on the subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transactions where they have placed themselves, and will refuse to grant relief to either party.” 60 O. S., *supra*.

The purpose of the amendment was to protect the public against the acts of county commissioners in disregard of statutory requirements as to their duty, whether acting ignorantly or otherwise, and to provide a remedy as full and complete for the recovery back of money actually paid on such void contracts as that previously existing to prevent such payment.

In the case of *The Vindicator Printing Co. v. The State of Ohio*, 68 O. S., 362, held:

“The act of April 25th, 1898 (93 O. L., 408), clothes the prosecuting attorney with power to recover back money so illegally drawn from the treasury on and after its passage.”

And on page 372, the court say:

“Manifestly it is the purpose of this statute to re-imburse the treasury for unauthorized payment for it, *not otherwise provided for*.”

This right of action is provided for *tax-payers* through the prosecuting attorney, and not for the county commissioners, nor for any other party to such void contracts. It is significant that no provision whatever is made in the amended act for any party but the public. All parties to such void transactions are left without remedy, just where they placed themselves.

If, as held in *Bridge Co. v. Campbell et al*, *supra*, no action could be maintained by the bridge contractor under such void contract for the recovery as upon an implied contract, of the fair value of the structure furnished, where payment of the contract price had been perpetually enjoined, it is difficult to see the consistency of holding that the structure itself shall be returned by the public in pursuing the remedy provided for it alone, not being a party to the void transaction.

This would be equivalent to holding that the bringing of an action to obtain the benefit of the remedy provided for the public, would operate to purify the unlawful transaction between the commissioners and the bridge company, or its agents. Equities do not arise from unlawful transactions. Parties seeking equity must have clean, not soiled, hands. The defendants were bound to, and did know the law (60 O. S., 425), and having acted in disregard of its provisions, did so at their peril, and must suffer the consequences, whatever they may be.

The public had nothing to do in making such void contracts, nor placing the structures contracted for, and are under no obligations to restore them to the outlawed contractors or their agents. What such outlawed contractors might do toward reclaiming, and themselves removing such structures, is not a question in this case.

As held in *Jones, Auditor, v. Commissioners of Lucas County et al*, 57 O. S., 189:

“The board of county commissioners represents the county in respect to its financial affairs only so far as authority is given to it by the statutes.”

It would seem that Judge Wildman in holding, in the court below, that the bridges should be returned, must have based his decision upon the theory that some act of the public by way of a rescission, is required to avoid these contracts notwithstanding Section 2834b declares them void, as he makes frequent use of the term “rescission.”

The contracts involved being in contravention of law, null and void from the beginning—not voidable—no act of rescission or restoration is required from the prosecuting attorney to the public, neither being a party to the contract.

“The act of rescinding is where a contract is canceled, annulled or abrogated *by the parties or one of them.*” Black’s Law Dict., “Rescission.”

The author (Black) under this term quotes from 1 Cal., 281:

“There is a distinction between ‘rescission’ and ‘nullity.’ Nullity takes place where the act is in contravention of the law
* * * Rescission is where an act, valid in appearance, conceals a defect which may make it null if demanded by any of

the parties, as for example, mistake, fraud, force, deceit, want of age, etc. * * * Nullity relates generally to public order and can not, therefore, be made good by ratification or prescription. So that the tribunals ought for this reason alone to decide that the null act can have no effect, without stopping to inquire whether the parties to it have or have not received any injury. Rescission on the contrary may be made good by ratification or by silence of the parties."

In other words, rescission and restoration apply to voidable contracts, and not to nullities such as are the contracts in the case at bar.

As to the application of the terms "void" and "voidable": 28 A. & E. Ency. (1st Ed.), 475, and note 2; 6 Metc. (Mass.), 415; 14 O. S., 68; 1 Ohio, 458, 468.

The amendment of 1898 being remedial should, like all remedial statutes, be construed liberally for the suppression of the mischief provided against and the advancement of the remedy. The old law, the mischief and the remedy are the points to be considered. 1 Cooley's Blackstone, 3d Ed., 86.

In 31 O. S., 367, the court say:

"It is a rule of interpretation universally accepted that in giving construction to the statute, the court will consider the policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its objects by effectuating the design of the Legislature."

In 60 O. S., 425, *supra*, the court say:

"It is necessary to so construe the statutes in order to prevent the evils which induced the enacting of them. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend."

If such "public servants" and their "favored friends" were satisfied that the law would be construed to allow their beneficiaries to retain the money so unlawfully obtained, until such bridge structures should first be returned, they would not fear to ply their vocation, for they might reasonably conclude that the public would be slow to pursue a remedy having such a burdensome and impracticable condition attached.

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Probably very few, if any, actions to recover back would be brought, and the intended remedy instead of being advanced, would be rendered futile.

PARKER, J.; HAYNES, J., concurs; WILDMAN, J., not sitting.

Error to the court of common pleas.

This case was submitted to Judge Haynes and myself; Judge Wildman, the third member of the court, having passed upon the case in the court of common pleas, and his decision there being under review, he did not sit here.

The opinion of Judge Wildman, published in 3 N. P.—N. S., 303, is so full and complete in its statement of the facts and issues as to make it unnecessary to restate the same, and for the statement of the case, we refer to that opinion.

The question in this case, is whether or not Section 1277, Revised Statutes of Ohio, 1880, as amended in 1898, 93 Ohio Laws, page 408, authorizes the recovery back by the prosecuting attorney of money paid on county commissioner bridge contracts, void under Section 2834b, for the lack of the county auditor's certificate, as therein required, without an offer to return or surrender to the contractors the structure furnished by them, and accepted by the county commissioners under such void contract, where such structures are retained by the county and may be returned.

The question arises upon demurrers to certain answers. The negative answer given to this proposition by the court of common pleas resulted in the overruling of the demurrers, and the plaintiff desiring to present that question at once to the higher courts, and not choosing to plead further, judgment was entered in favor of the defendants upon the answers.

The answers admit the allegations of the petition to the effect that the certificate required by Section 2834b of the Revised Statutes had not been furnished, but they set forth that the contracts were entered into in entire good faith and honesty of purpose, and that a failure to procure the certificate and have it filed was a mere inadvertence; that it was not done with any design to violate the law or commit any fraud or wrong. That the property furnished was of value equal to the price charged and paid, and that the property has ever since been retained

and used by the county, and is now in the possession of the county; that the county does not purpose or offer to return it, or to allow the bridge company to have it. The contention is thereupon made that the action to recover the price can not be maintained until the county returns or at least signifies a willingness to surrender possession of the property, so far as that may be practicable, and whether that is required of the county is the real question presented.

The court of common pleas was of the opinion that relinquishment of claims to the property is required under the circumstances set forth in the answers, and admitted by the demurrers, and with that conclusion we are in accord. Very little could be added, we think, to the reasoning in support of that proposition contained in the opinion of Judge Wildman, and in the authorities upon which his conclusion was largely based.

There are some conclusions upon subordinate questions, with respect to which we are not in exact accord with Judge Wildman, or the opinion expressed by Judge Spear, of the Supreme Court, in *Printing Company v. State*, 68 O. S., 362, and we feel disposed to express our own views upon those questions.

Counsel for the plaintiff insist that Section 1277, Revised Statutes, as amended April 25, 1898, authorizing the prosecuting attorney to institute an action in the name of the state, to recover back for the use of the county all public moneys misapplied or illegally drawn out or withheld from the county treasury, or to recover for the benefit of the county, any damages resulting from the execution of illegal contracts, gives to the public when thus represented by the prosecutor a new and different cause of action from any theretofore existing in favor of the public.

Counsel for the defendants insist that this statute only confers a power upon the prosecuting attorney to represent the public in the prosecution of actions upon causes of action that are not new and are not created by this statute.

The following section, 1278, authorizes like suits to be brought by tax-payers after they have made a request upon the prosecuting attorney to bring the suit, and he has refused or failed to do so.

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It has seemed to us that the contention of counsel for the plaintiff is wrong, and that the opposite contention, the view maintained by counsel for defendants, upon this proposition is correct.

It is said by counsel for plaintiff in his brief that the case of *The Buchanan Bridge Company v. Campbell et al*, in the 60th O. S., 406, arising upon a contract entered into in 1894 under the law as it was before the amendment of 1898, revealed the lack of the remedy which the plaintiff contends was provided by that amendment, and that the amended law was passed by the Legislature for the purpose of providing such remedy. That prior to the amendment, if a suit in injunction was brought in time, the injury was averted, but if the mischief had been accomplished, the public was remediless. That this put a premium upon successful fraud, and that the purpose of the amendment was to protect the public, and provide a remedy as complete for the recovery of money actually paid upon an invalid contract as that existing prior to the amendment to prevent such payment.

In so far as this amendment of April 25, 1898, confers the right or power to institute the action upon the prosecuting attorney we think the contention of counsel for plaintiff is correct; but that there was no cause of action in favor of the county in transactions of this kind, or no body authorized to institute suits on behalf of the county in cases like this before that amendment, we think is not true; nor do we think that the case of *The Buchanan Bridge Company v. Campbell et al* disclosed such disability upon the part of the county or was the moving cause of the amendment referred to. If we have the true history of the moving cause of this amendment, and we think we have, it was a desire to have suits instituted by some other authority than the county commissioners against certain county officers to require them to convert back into the treasury certain funds they were charged with having illegally drawn as fees and compensation, and therefore the power to institute the suits was conferred upon prosecuting attorneys. A case of that character afterwards came before this court, and we decided that the amendment was ineffectual to accomplish the object sought for the reason that the law as amended contains no provision that it shall reach past transactions; and that

holding was made under Section 79 of the Revised Statutes, which is a statutory declaration of the general rule and principle that statutes have a prospective operation, unless the purpose to have them act retrospectively is made distinctly manifest.

Before this statute of April 25, 1898, was passed, Section 845 of the Revised Statutes provided that—

“The board of county commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and of bringing, maintaining and defending all suits, either in law or in equity, involving an injury to any public, state, or county road, ditch, drain, or water-course established by such board in their county, and for the prevention of injury to the same; and any such board or county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair; *and to ask, demand and receive, by suit or otherwise,* any real estate or interest therein, whether the same is legal or equitable, belonging to their county or *any sum or sums of money or other property due to such county,* and the money so recovered in any case shall be by them paid into the treasury of the county, and they shall take the treasurer’s receipt therefor, and file the same with the auditor of the county.”

They were the general financial agents of the county, authorized to bring actions for the protection of its property, or the recovery of money or property belonging to the county.

It was held by the Circuit Court of Hamilton County, in 1889, in the case of *The State of Ohio, by John Schwartz, Prosecuting Attorney of Hamilton County, v. John Zumstein et al*, and certain other actions all decided and reported at the same time, and found in Vol. 4, Ohio Circuit Court Reports, page 268, that—

“Where money is illegally drawn from the county treasury, the prosecuting attorney of the county, in the absence of a statute authorizing him to do so, can not bring an action in the name of the state, for the use of such county, and recover a judgment therefor. Section 1277, Revised Statutes, only authorizes him to sue in such a manner as to restrain a threatened misapplication of the funds of the county, or the completion or execution of a contract in contravention of the law of the state, or which was procured by fraud or corruption; and no other statute authorizes him to bring an action in cases like these.”

And that seems to have been the law with reference to the power of prosecuting attorneys in the premises up to the time of this amendment of Section 1277.

That case was affirmed by the Supreme Court, and that case, we believe, is the one which disclosed the ability of prosecuting attorneys to maintain actions of this kind. But the court added, and it appears as part of the syllabus, that—

“That duty (the duty to institute such actions) is imposed upon the county commissioners as the financial representatives of the county.”

In the case of *Jones, Auditor. v. The Commissioners of Lucas County*, reported in the 57th O. S., page 189, with other cases decided at the same time, the question of the right or power of the commissioners to institute an action of that character (that particular case being an action to recover back from the auditor fees which it was charged he had illegally drawn) it seemed to counsel was involved, and so it was discussed, but the Supreme Court did not find itself obliged to pass upon it for the reasons stated in the opinion by Judge Spear. I quote from page 209:

“A question much argued, whether or not there can be a recovery back by the commissioners, we think does not arise upon the record in this case, because of the agreement of the parties embodied in the submission, that if the allowance is found not to be regular and proper under the law, judgment is to go against the defendant.”

But by the court of common pleas and the circuit court of this circuit, it had been determined in that case that such action might be maintained by the county commissioners.

We are not sure that the question has been passed upon distinctly by the Supreme Court, but we are confident that the decision of this court in the case of *Jones, Auditor*, and the decision of the Circuit Court of Hamilton County in the case to which I have referred, were correct upon that point.

In the *Buchanan Bridge Company* case, it does not seem to me that any disability operating to the disadvantage of the county was disclosed. Nothing of that kind appears to have been commented upon or mentioned. In that case, the county had received the bridge and continued to keep it, notwithstanding the fact

that it had not paid for it. Whether it had the right to keep the bridge, whether it might keep it, in spite of the bridge company, without paying for it was a question not mooted; at least, not presented to the court for its consideration or decision and not decided. At the very close of the opinion by Judge Burket, this remark is made:

“In this case both parties have acted in disregard of the statute, and the court will leave them where they have placed themselves, and refuse to aid either.”

And in argument here, a great deal seems to be made of that expression by Judge Burket. That was an action upon contract. The bridge company having failed to receive pay for the bridge, and it having been determined it could not enforce the express contract, was seeking to recover upon a *quantum valebant*, upon an implied promise to pay so much as the bridge was worth: and it is with respect to that state of facts and with respect to the attitude of the parties there—their effort to undertake to enforce contractual rights growing out of the transaction—that we understand Judge Burket to be speaking; and of course he there states the general rule and principle that where a contract is void, in any efforts the parties may make to enforce contractual rights the court will not aid them, but it will still leave them where they have placed themselves. But it does not follow that there may not be rights arising out of the transaction—rights for the enforcement of which the law affords a remedy, and where a remedy like that pursued in this case is given it does not follow that it is enforceable unconditionally.

It was certainly not very severe upon the county in that instance for the court to pronounce that it would leave the parties where it found them, for the reason as I have said the county had both the bridge and the money. But we do not understand that as meaning that if the county had paid out the money either upon receiving the bridge, or without having received it, the county would be without remedy to recover the money. We have no doubt that the county had such a remedy in such a case, and that not by virtue of the amendment of Section 1277, but by virtue of the general principles of law, to be enforced by the commissioners under Section 845. But because there were many

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transactions arising in which the commissioners were purchasers, and the public was not likely to be protected by the institution by the commissioners of actions that must impeach their own conduct, it was well and wise to enact this amendment of 1277, placing the authority to bring such actions in another public officer, or if he failed, then in a tax-paying citizen.

In the course of his opinion, to which I have already referred, Judge Wildman says as follows:

“Until the amendatory statute of 1898, a county whose officials paid out funds in fulfillment of invalid contracts, had no recourse on the recipient. This principle, recognized in the Buchanan Bridge Company case, *supra*, subjected an innocent public to loss because of the voluntary, but unauthorized, acts of its agents. To cure the manifest injustice of the principle, a new remedy was given to the public by the amendment. An action was provided for the recovery of the money and its restoration to the public fund. The reason for the amendment is manifest. The agents of the county exceeded their authority, and although they acted voluntarily the county did not voluntarily part with its money. Voluntary acts of the officials were not the voluntary acts of the public.”

Therein it will be observed his views are in harmony with those expressed by counsel for plaintiff in error.

In the case of *Printing Company v. The State*, 68 O. S., 362, Judge Spear says of this amendment, pages 372-373:

“Manifestly it is the purpose of this statute to reimburse the treasury for unauthorized payments from it not otherwise provided for. It is in one sense a remedial statute, and yet it gives a right of action which before its enactment did not exist, and could not, we think, apply to past transactions.”

Judge Spear appears to deduce therefrom that this statute authorizes the recovery back of the money notwithstanding it may have been voluntarily paid. That cuts off the possible defense of voluntary payment. The court had already in *Jones v. Commissioners* determined that the defense of *res judicata* could not be interposed in a suit by the commissioners though they had allowed the claim, where the claim was wholly illegal. That principle has been re-affirmed in a number of cases since, including the printing company case; and we think that for substantially the same reasons the defense of voluntary payment could not have

been interposed successfully against a claim asserted by the county commissioners or the prosecuting attorney on behalf of the county or public, for funds illegally paid out by county officers, and that it was not necessary to invoke the amendment of Section 1277, or to construe it as modifying rights of action, in order to determine that question against the printing company.

If an auditor, without authority of law, should draw a warrant in his own favor, or in favor of another, and the treasurer should pay that warrant, and an action were brought to recover back the money from the recipient, could the recipient ever have interposed the defense that the money thus payed to him without authority of law was voluntarily paid, and that therefore it could not be recovered back? We have not made a study of or search for authorities upon this proposition, but it seems to us so apparent that that defense could not be interposed under such circumstances, that we have not deemed it necessary to find authorities. We do not understand that public officers can make a raid upon the public funds and pay them out illegally, and that the persons receiving the funds can, in an action to recover them back, defend upon the theory that because the officers have acted voluntarily in an effort to rob the public they have bound the public under some doctrine of estoppel, or voluntary payment. The cases cited in the opinion in the printing company case as supporting the doctrine of voluntary payment in the case of payment of public funds by public officers do not any of them seem to us to support such defense where the payment is upon a claim or demand wholly illegal.

In the case of *Printing Company v. The State of Ohio*, the public could not recover back on account of the bills for printing paid before the amendment, for the reason that the statute giving authority to the prosecuting attorney to pursue this remedy, does not relate to past transactions; but it seems to us that if the action had been prosecuted by the board of county commissioners instead of the prosecuting attorney, the plaintiff would have met with no such difficulty as to past transactions.

According to our view, Section 1277, both as it stood before the amendment and as it stands now as amended, is not a statute defining rights or giving causes of action, but it is a statute conferring powers to pursue causes of action by appropriate suit or

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action, in some instances by bills in equity, and by injunction, and in other cases, where it would be appropriate “by civil action in the name of the state.”

We do not understand that this statute so operates upon causes of action as to change their nature, or that it so operates upon them as to remove any infirmities or conditions that may attach to them, or so as to remove any defenses that might be interposed to them. In cases like this, as I have intimated, we think it is well settled that the defense of *res judicata* and the defense of voluntary payment may not be interposed, but if the case were such before this amendment as that the plea of *res judicata*, or voluntary payment may not be interposed; but if the case were pose that such right of defense is not taken away or destroyed by the amendment. If the defense of the statute of limitations were interposed, would it be argued, could it be said that because this statute authorizes the prosecuting attorney to bring an action to recover the money back, that cuts off the defense of the statute of limitations? that by virtue of the statute he must recover it back? that it determines in the first instance what the result of the action must be? that it so operates upon the cause of action as to deprive the defendant of defenses that he might otherwise have to it? We think not. The statute does not say expressly, and we think it is not intended to imply that the usual legal and equitable incidents of the transaction affecting the rights of the persons asserting the claim, or the rights of persons defending against the claim, shall be altered by the statute. It simply says the claim, whatever it may be, may be prosecuted in the name of the public, and for the benefit of the public, by the prosecuting attorney, or if not by him, by a tax-payer.

In the expression of these views, we appreciate the fact that we are differing somewhat from judges of recognized ability and reputation, for whose views we have the greatest respect; but it appears to us that in thus expressing such views in deciding the points decided in the cases, they went beyond what was necessary to the decisions, and after due consideration such views seem to us too be erroneous.

What the further results may be if it shall be disclosed that the county may not be able or willing to make restitution of or relinquish all claim to the property, we do not now attempt to say

or forecast. We leave that for future development. We do say, that it appearing that the county has not shown a willingness or disposition to return or relinquish its claims to the property, and no disability to do so being apparent, that in our opinion discloses a defensive position; that while this is not precisely an action for the rescission of the contract, it is of that nature, it is an action for the rescission or undoing, so far as possible, of transactions which were initiated by a contract, and which grew out of a contract. The contract itself is void. No contractual rights arose out of it, and there are no contractual rights to be enforced. But the fact remains that a bridge has been obtained by the county, that payment for the bridge has been made and that both parties to the transaction acted in good faith, and the county suffered no actual loss; and that because of the illegality of the transaction the public, through the prosecuting attorney, is authorized to sue to recover the money paid. The bridge appears to be in the possession and use of the county, and we think the county before it should be permitted to recover the whole amount (and that is what it seeks to recover) should at least evince a willingness to relinquish any claim to the bridge.

As I have already said, the facts as pleaded and confessed by the demurrer show good faith in the transaction, and that the failure to furnish the certificate was a mere inadvertence. If there were fraud in the transaction the rights of the parties might be somewhat different on a question of rescission, but can it be said that because of Section 2834b, which requires the certificate for the evident purpose of preventing public authorities from entering into contracts which may require the payment of money, unless the money is on hand to make the payment—preventing them from going in debt—can it be said that in all instances, no matter what the circumstances, if this certificate is not placed on file, the contract is so utterly void that no rights or liabilities can grow out of the transactions? We think that is not true, even though contractual rights may be vitiated and extinguished. We can imagine a case where fraud might be perpetrated upon a person selling a bridge to the county, a bridge company if you please, by a representation that the certificate was on file, by an exhibition of something which purported to be a genuine certificate, but which was not—where as a matter

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of fact the certificate required by law was not on file. Will it be said that in a case of that kind, where the county had obtained the property, it might retain it without paying for it? A certificate might be placed on file, but one so defective in character that it would not come up to the requirements of the statute, and yet the parties might proceed in good faith, supposing it to be a good and sufficient certificate. If it should turn out that it was not, would it be said that this statute is so drastic that the result would be that the county could keep the property without paying for it. It is to be remembered that statutes are not to be construed as imposing penalties or forfeitures unless that purpose is so clear and manifest that the conclusion that such was the purpose can not be escaped; and here we find nothing in the statute indicating a purpose to impose a penalty or a forfeiture, but the purpose, so far as we can gather it from the statute, is only to save the county or public from wrong or imposition or loss; and where the contract is repudiated and there is no fraud in the transaction, and there is an effort to place the parties in *statu quo*, as nearly as possible, we think that effort should be forwarded by the courts.

The judgment of the court of common pleas will be affirmed.

WILDMAN, J.

While sitting as a judge in the common pleas court, I passed on the demurrer just considered by Judge Parker, and for that reason have taken no part in the review of the case by the circuit court.

While the opportunity offers, however, I wish to place myself in accord with my associates upon the circuit bench, and with what I believe to be a correct interpretation of the law, by assenting to the criticism which has been made upon certain expressions in the opinion rendered by me in the court below.

I refer to the expressions following the dicta of one of the judges of the Supreme Court in the interpretation of the statutes in force at the time of the decision of the Vindicator Publishing Company case, and indicating that a county at that time had no cause of action to recover, through its officials, money which had been paid as the price of bridges under invalid contracts.

My present judgment is that the county had such cause of action, even prior to the enactment of the amendment of 1898, and that the amendment was the designation of an official who might institute the suit on behalf of the county. Before that time, the power to protect the interests of the county so far as suing to recover moneys unlawfully paid out was concerned, resided, under the general statutes, in the county commissioners. By reason of possible complicity of county commissioners in the making of illegal and invalid contracts, the Legislature by this amendment gave to another public officer, the power to represent the county in the protecting of its interests. Provision had already been made that the prosecuting attorney might, by proper suits, prevent the carrying out of unlawful contracts, but there was no provision that the prosecuting attorney could so represent the county in the recovery of money which had been illegally paid from its treasury.

In order further to protect the interests of the public the amendment of 1898 empowers any tax-payer to represent the county in case the prosecutor refuses to act as such representative. By these enactments the law clothes either the prosecuting attorney or the tax-payer with a certain representative capacity to act for the county, not only in the endeavor to bring back to the treasury the funds which have been unlawfully taken therefrom, but also in making such proffer for the county as the county should justly make as a condition precedent to obtaining redress of the wrong which has been committed against the public.

It is because of the fact that the opinion which I announced from the common pleas bench has gone into one of the published journals, and because the decision which has been rendered by the circuit court at the present hearing is very likely to be reported, that I have thought best to make these statements in order to harmonize any apparent difference between the opinion entertained by my associates and my own.

M. W. Hunt and Basil Meek, for plaintiff in error.

Hunt & Garn, for defendant in error.

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**QUO WARRANTO AGAINST A MUTUAL BURIAL
ASSOCIATION.**

[Circuit Court of Lucas County.]

STATE OF OHIO, EX REL LYMAN W. WACHENHEIMER, PROSECUTING
ATTORNEY FOR LUCAS COUNTY, OHIO, v. THE TOLEDO &
LUCAS COUNTY BURIAL ASSOCIATION.

Decided, June 9, 1906.

Corporations not for Profit—Existence of, Justified. When—Irregularities in Organization—By-Laws—Proper Procedure in Adoption of—Other Preliminaries of Organization—Annual Meetings and Annual Elections—Classification of Insurance Companies, Beneficial Organizations and Mutual Burial Societies—Subsidiary and Controlled Organizations—Minors Incompetent to Become Members—Sections 3631a, 3240, 3250, 3251 and 3252.

1. Where the incorporation of an organization for a particular purpose is justified by expressed sanction of the Legislature, and the sanction is not unconstitutional, the courts are not at liberty to dissolve the organization on the ground that its purpose is not beneficial to its members or to the public.
2. Section 3631a is not unconstitutional in that it confers upon an organization of the character of a mutual burial association, whether it be regarded as an insurance company or a beneficial society, rights and privileges differing from those bestowed upon other associations doing a similar business.
3. Where such an organization is not subsidiary to or controlled by a corporation for profit, the fact that some of its officers, directors and members are also officers, directors and stockholders of a corporation for profit, does not constitute an offense against the law or call for a revocation of its charter.
4. Irregularities and omissions of statutory requirements, in an attempt made in good faith to organize a corporation not for profit, are not a sufficient basis for a judgment of ouster, where the irregularities and omissions are no more vital than occurred in this case; but the corporation will be recognized as a *de facto* organization and its board of directors as a *de facto* board, and a decree will be granted requiring that a legal organization be effected.
5. Infants can not become members of such an organization; its purposes can not be made to include a form of benevolence not au-

thorized by statute; it can not provide for assessments which are not based on mutuality as to benefits; and only duly qualified members can participate in the election of its trustees and officers.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

This is a proceeding in quo warranto, the purpose being to oust and exclude the defendant from the exercise of corporate rights, privileges, powers and franchises, for the reason, it is charged, that it has forfeited such rights.

The petition sets forth the incorporation of the association. an attempt at organization, the rules or so-called by-laws under which it has been operating, and then follow the charges of acts which, it is claimed, result or should result, in a forfeiture of its franchise. The whole matter is set forth in detail in the petition as follows:

Now comes Lyman W. Wachenheimer and represents to the court that he is the duly elected, qualified and acting prosecuting attorney in and for Lucas county, in the state of Ohio; that for said state in this behalf he comes here before the Judges of the Circuit Court of and for Lucas County in said state, at the January Term, 1906, and on the eighth day of May, 1906, and gives the court to understand and be informed:

That the defendant, the Toledo & Lucas County Burial Association, is a corporation, incorporated under the general corporate laws of the state of Ohio, and has been such since the month of January, 1905, and is located, and has its principal place of business at the city of Toledo, county of Lucas, state of Ohio; that said defendant became and is so incorporated, as aforesaid, as a corporation not for profit, and for the purpose of providing for the payment of the funeral expenses of the members of the association by assessments upon such members, but for no other purpose whatsoever.

Said defendant, since its incorporation, has been and still is claiming and pretending to do business under the plan of by-laws and contracts set forth and made a part hereof as follows:

BY-LAWS.

NAME.

ARTICLE I.—NAME.

The name of this association shall be the Toledo & Lucas County Burial Association.

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ARTICLE II.—OBJECT.

The purpose for which this association is formed is to provide for the payment of the funeral expenses of the members of this association by assessments upon such members.

ARTICLE III.—MEETINGS.

The annual meeting of members shall be held at the rooms of the association in Toledo, Ohio, on the second Monday in January in each year.

Special meetings may be called by the president upon twenty-four hours' previous notice by publication in some newspaper published in Toledo, Ohio. At all meetings a majority of the members shall constitute a quorum.

ARTICLE IV.—OFFICERS.

The officers of this association shall be a president, vice-president, secretary, treasurer and fifteen trustees, who, with the exception of the secretary, shall serve without compensation. They shall be elected for one year but serve until their successors are elected and qualified. All elections shall be by ballot and a majority of all the votes cast shall be necessary to a choice.

ARTICLE V.—DUTIES OF OFFICERS.

Duties of President.

It shall be the duty of the president to preside at all meetings, sign the records thereof, and in general to perform all the duties incident to the office.

Duties of Vice-President.

It shall be the duty of the vice-president to perform all the duties of the president during the absence or disability of the latter.

Duties of Secretary.

It shall be the duty of the secretary to keep an accurate record of all acts and proceedings of the members and trustees, and in general to do all things and acts usually devolving upon such officer.

Duties of Treasurer.

It shall be the duty of the treasurer to keep an accurate record of all moneys received and expended by him; to deliver such records and moneys to his successor upon the expiration of his term of office.

ARTICLE VI.—AMENDMENTS.

These regulations may be amended by two-third vote of the members present.

ARTICLE VII.—DUTIES OF TRUSTEES.

It shall be the duty of the trustees to exercise a general supervision

over the business of the association and they shall elect all officers of the association, which election shall be by ballot. Eight trustees shall constitute a quorum.

ARTICLE VIII.—MEMBERSHIP.

Membership shall be divided into three classes, viz: Class A, Class B, Class C.

Class A.

Shall include persons in good health between the ages of ten years and sixty years.

Class B.

Shall include children in good health between the ages of one year and ten years.

Class C.

Shall include persons over sixty years of age.

ARTICLE IX.—INITIATION FEES AND DUES.

The initiation fee for Class A shall be ten cents, and dues shall be eighteen cents per month, payable on the first day of each month, and unless paid on the first day of each month said member shall be in arrears.

The initiation fee for Class B shall be eighteen cents, and there shall be no dues paid in this class. It is necessary, however, that parents or guardian be members of Class A before children are entitled to membership under Class B.

The initiation fee for Class C shall be eighteen cents, and there shall be no dues paid in this class.

ARTICLE X.—FUNERAL BENEFITS.

Members of Class A in good standing at time of death shall be provided a funeral consisting of embalming, professional service, casket and outside box, suit or robe and funeral car, to the value of one hundred dollars.

Members of Class B whose parents or guardians are in good standing in Class A shall at death be entitled to a funeral to the value of fifty dollars as shown in Class A.

Members of Class C shall at death be entitled to a discount of twenty per cent. on their funeral bill.

ARTICLE XI.

All funerals must be conducted by the association undertaker.

ARTICLE XII.—SUSPENSIONS.

Any member of Class A owing one month's assessment and the same being in arrears for fifteen days shall, "together with any member of Class B contracted for by said member," be suspended.

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ARTICLE XIII.—WITHDRAWALS.

Any member of Class A desiring to withdraw from the association may upon application to the secretary receive a receipt for the full amount paid the association for dues, which amount may be applied on the payment of the member's funeral, provided said funeral is conducted by the association undertaker.

ARTICLE XIV.

Members removing their residence outside of the county of Lucas in the state of Ohio, thereby forfeit their membership.

ARTICLE XV.

Three cents of the monthly dues paid by each member together with ten cents of the initiation fee shall be applied to the operating expenses of the association.

ARTICLE XVI.

In the event of the death of a member occurring outside of Lucas county, this association will take charge of the remains on arrival in Toledo and will be responsible only for expenses thereafter incurred to the extent of its liability as provided for in Article X.

Plaintiff further says that said defendant since its said organization has been and still is engaged in carrying on and transacting the business of insurance by soliciting members to its association, from all persons over one year of age, and said members have been and still are procured by entering into contracts with the proposed member according to the particular class in which such persons because of his or her age under said by-laws belongs. Said contracts for said members respectively have been and are for said Classes A, B and C, respectively, as follows:

COPIES OF CONTRACTS.

Class A.

Contracts between _____ and the Toledo & Lucas County Burial Association for and in consideration of the payment by _____ to the Toledo & Lucas County Burial Association, of _____ initiation fee, the receipt of which is hereby acknowledged, and of _____ assessments to be hereafter paid, as provided by the by-laws of this association. The Toledo & Lucas County Burial Association agrees, on the death of _____ to provide a funeral costing \$100, as provided in the by-laws of the association.

Class B.

Contract between _____ and the Toledo & Lucas County Burial Association for and in consideration of the payment by _____ to

the Toledo & Lucas County Burial Association of the initiation fee, the receipt of which is hereby acknowledged. The Toledo & Lucas County Burial Association agrees to furnish in the event of the death of _____ the _____ of _____ before _____ arrives at the age of ten years, a funeral to cost \$50, as provided by the by-laws of the association.

Class C.

Contract between _____ and the Toledo & Lucas County Burial Association for and in consideration of the payment by _____ to the Toledo & Lucas County Burial Association of the initiation fee, the receipt of which is hereby acknowledged. The Toledo & Lucas County Burial Association agrees that on the death of _____, _____ funeral bill shall be subject to a discount of twenty per cent., provided that funeral is conducted by the association undertaker.

Plaintiff further says that ever since its incorporation said defendant has continuously within this state, to-wit, in the county of Lucas, offended against the laws of this state, under which it was incorporated and created, grossly abused and misused its corporate authority, franchises and privileges, and unlawfully assumed, usurped and exercised franchises and privileges not granted to it by law, and in contravention of law, and especially in the following particulars, to-wit:

First. The original incorporators of defendant, five in number, upon its incorporation elected one of their number, John J. Murphy, a trustee of defendant, and elected or appointed fourteen other persons trustees, fifteen in all, but your relator is informed that none of these persons have ever been members of defendant. A number of said so-called trustees thus elected, the exact number being to your relator unknown, have never given their consent to such election nor have they ever taken any part in the management of the affairs of defendants, but on the contrary they have requested that their names be dropped from the list of officers on the books and literature of defendant. Less than half of said persons, so-called trustees, the exact number being to your relator unknown, have, since said incorporation, transacted the entire business of defendant, independently of the knowledge or will of its members, and this notwithstanding the membership of defendant since its incorporation has been large in number. Upon the incorporation of defendant many

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persons became members thereof under the forms of contracts set forth above and their number have reached several thousand from time to time, but they have been allowed no voice in the election of trustees or in the management of the affairs of the defendant, nor have they ever participated in either of the same. No regulations have ever been adopted by the members of defendant nor have they ever taken any steps whatever toward the organization of defendant under the law or otherwise.

Upon the incorporation of defendant said trustees so managing its affairs as aforesaid, immediately attempted to adopt the so-called code of by-laws set out above herein, and they have pretended since then to manage the affairs of defendant thereunder and in accordance therewith and the law, but in fact said affairs have not been carried on.

1. A number more than half of the so-called trustees never received a notice of any meeting of the members or trustees, nor have they ever attended any such meeting, or participated in the election of officers or any other business of the association.

2. There has never been a meeting of the members of the association nor have they ever received any notice to attend any such a meeting from any one.

3. No officers or trustees of the association have ever been elected by the members.

4. No reports of the condition or affairs of defendant has ever been made to the members, or any of them.

5. No accounting for any money paid into the treasury of the association or otherwise has ever been made to the members thereof. Large amounts of money have been collected by said active trustees for defendant since the incorporation, but the exact amount is to relator unknown.

6. Said by-laws, so called, were adopted by less than half of said alleged trustees and without notice to the others of said fifteen persons, and those so adopting the same have assumed the management and control of the business and affairs of defendant, independent of and without the knowledge of said other trustees and members.

7. If any changes have been made in said by-laws since the incorporation of defendant or any new trustees elected, both

have been done by said persons so actively engaged in controlling affairs of defendant, and this for the purpose of perpetuating themselves in such office and in such control.

Second. Defendant was so incorporated and has been and still is operated with and for the profit and benefit of said active trustees and their agents and the Toledo Undertaking Company, which company is a corporation incorporated and organized for profit on or about October 24, 1904, under the laws of Ohio, and with its place of business at Toledo, Ohio.

The stockholders and directors of said undertaking company promoted and organized defendant, and its directors are also the active trustees of defendant, managing and controlling the business and affairs of defendant, independently of the members of defendant as set forth above herein. Said undertaking company is the "official undertaker" of defendant and is the agency through which defendant operates in furnishing its funerals for members and this is done by a pretended contract between the two organizations by the terms of which those operating defendant agree to and do pay said undertaking company and, through it, back to themselves, one hundred (\$100.00) dollars for each funeral of members of Class A, and fifty (\$50.00) dollars for each funeral of members in Class B. Funerals of members in Class C are furnished at a discount of twenty per cent. from whatever price the undertaking company and the active trustees of defendant see fit to place on whatever sort of a funeral the two organizations elect to give the deceased members of this class, and in all classes the funeral must be furnished by said undertaking company.

Defendant procures its members by writing with the person solicited a contract for the particular class, A, B or C, to which the proposed member, because of age, belongs under said by-laws, and on the form for said classes, respectively, as set forth above herein. The members in Class A pay an initiation fee of ten cents and premiums or dues of eighteen cents per month from initiation until death, and in consideration of the performance thereof defendant is to provide a funeral costing \$100.00 as provided in said pretended by-laws.

The members in Class B, persons from one to ten years of age, are furnished a funeral "to cost \$50.00," as provided by said

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pretended by-laws, under a contract between defendant and some third person by which the latter pays an initiation fee of eighteen cents; but no premium or dues are charged, though this member's parent or guardian must be members of Clas A.

Membership of Class C, persons over sixty years of age, is procured by writing with some one a contract under which some one pays defendant an initiation fee of eighteen cents for the member, but no premiums or dues are thereafter required or paid, and in consideration thereof this member shall at death be entitled to a discount of twenty per cent. on the funeral bill, if the funeral is furnished by the "association undertaker."

All these contracts which are complied with at all by defendant are discharged through its association undertaker and agent, the Toledo Undertaking Company, by furnishing the funeral referred to in the contract of membership and consisting of service, goods, wares and merchandise of such kind and quality as the common officers of these two organizations see fit to give. No money is paid to the estate or relatives or next kin of the deceased to furnish funeral or for any other purpose.

Third. Defendant does not collect assessments from its members surviving any deceased member in amounts simply sufficient to pay the expenses of the funeral of such deceased member, or in any other amounts, but the initiation fees and monthly premiums mentioned above for the respective classes are collected regularly whether necessary to meet the expense of the particular funeral in question or not, and relator says that defendant's income from initiation fees and monthly premiums from its members is largely in excess of the cost and expense incurred by it in furnishing its funerals and maintaining its association, and that since its incorporation defendant has realized large profits from its business, to-wit, several thousand dollars. Defendant has in fact never paid the expense of any funeral in money, but in all cases has, in violation of the rights and powers, simply furnished said funerals in service, goods, wares and merchandise of its own arbitrary selection.

Fourth. Defendant has been and is making contracts with third persons for the benefit of persons who desire to become

members and also for other persons without the knowledge of such persons in whose behalf the contract is written, and defendant has been and is making many contracts with persons sick, old and infirm and near death and persons affected with incurable disease and this for advertising purposes to turn surplus money over to said active trustees through the treasury of the said undertaking company, and in that way to the profit of the common officers and agents of these two organizations, in that in these and in every funeral furnished the service, goods, wares and merchandise furnished for each funeral, together with the proportionate amount of running expense of defendant, is always of a cost much less than one hundred dollars for Class A, and less than fifty dollars for Class B, and in fact in no instance has said cost for any funeral been in excess of forty (\$40.00) dollars; certain qualities of the service and materials mentioned in said by-laws for said funerals may be furnished for a much lower cost than forty (\$40.00) dollars. No specification of the character or quality of either service or material for the funeral is ever provided in any membership contract or otherwise, unless it be between said common officers of said two organizations, nor is there over designated in the contract or pretended by-laws or otherwise, any person, other than said common officers, who shall have the right on the death of a member to select, contract or demand as to the character or quality of said service or materials, or to require or demand that any funeral whatsoever shall be furnished such deceased member.

Fifth. Defendant, since its incorporation, has been and is transacting said business without having complied with the laws or any law of the state of Ohio regulating the business or insurance within said states.

Wherefore, plaintiff prays that defendant be found and adjudged to have forfeited and surrendered its corporate rights privileges, powers and franchises, and that it be ousted and excluded therefrom, and that it be dissolved; and that such other relief be granted in the premises as to the court may seem just and proper.

To this petition a short answer is filed, admitting that the association is a corporation and certain other facts, and denying all

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the alleged malfeasance and misfeasance charged in the petition.

The case has been tried to us and very fully argued, and a great many questions have been discussed that have seemed to be involved in the case, but we do not deem it necessary to discuss all these questions.

The association was organized under favor of Section 3631a of the Revised Statutes of Ohio, as amended March 29, 1904, found in Volume 97 of Ohio Laws, page 61, and of the statutes generally upon the subject of corporations not for profit. The object of the association is to provide for the payment of funeral expenses of the members in an amount not exceeding one hundred dollars for any one member, and the organization of such an association appears to be distinctly sanctioned by Section 3631a in that it provides that certain provisions of law applicable to insurance companies shall not apply "to any association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such association by assessments upon such members, when the amount of such payment on account of any one member does not exceed the sum of one hundred dollars, and when the membership of such association is limited to the county in which such association is organized."

It is urged in behalf of the relator that an association of this character is not likely to be beneficial to the members or to the public, and that it ought not to be sanctioned or encouraged by the courts. We deem it sufficient to say, in answer to that contention, that the express sanction of the Legislature establishes the legality and justifies the existence of the association, and that the courts are not at liberty to undertake to defeat the objects sanctioned by the Legislature, unless it shall appear that the law is unconstitutional. The wisdom or policy of legislation is a matter submitted by the Constitution to the law-making power. No doubt an association incorporated in pursuance of this statute may be organized or operated upon a plan which would require a court, upon its action being invoked, to oust the corporation, or to require a modification of its plans; but upon the general doctrine advanced by counsel that no such organization should be permitted to exist, we have no right or authority to undertake to overturn the declared policy of the Legislature.

It is also contended by counsel for the relator that this statute is unconstitutional, in that it confers certain rights upon an association of this character, and relieves it from certain burdens and disabilities, so as to favor it and give it special privileges different from those given to other associations doing similar business. This argument proceeds upon the theory that this is an insurance company, and it is said that because this insurance company is relieved from making certain reports, perhaps the payment of certain taxes to the state (I am not clear about that) imposed upon insurance companies, the law is open to this objection. In the first place, we are not prepared to say that this is an insurance company within the purview of the statutes of our state. Whether it is or not is a question not free from doubt or difficulty. Judging from the digests we have consulted, and without a critical study of the cases, it seems to us that the authorities are not quite in harmony. In *State v. Taylor*, 56 N. J. Law, 49 (27 Atl. Rep., 797), it was held that an association organized and doing business on substantially the same lines as those pursued by this association—paying sick and funeral benefits—was not doing an insurance business. And see *State v. Railway*, 68 Ohio St., 9, and *P., C., C. & St. L. Ry. v. Cox*, 55 Ohio State, 497, holding that certain associations for the aid and relief of railroad employes do not come within the purview of the insurance law. But we think this is not exactly a benevolent association, not distinctly and exclusively that; it has none of the social or fraternal attributes or characteristics that such organizations as the Odd Fellows, the Knights of Pythias and other organizations of that character have. We know that those associations, which are fraternal and benevolent, have sick benefits and have funeral benefits, and I believe it has never been supposed they come within the purview of the law touching insurance companies.

This association seems to us to occupy a sort of middle ground between associations of that character and insurance companies, and to which class it should be finally relegated we are not prepared at this time to say. But, assuming that it is an insurance company, we think it would be competent for the Legislature to provide that a company or association organized upon a mutual

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plan and agreeing to do no more than furnish a funeral, the cost of which should not exceed one hundred dollars, or to provide for the payment of funeral expenses to an amount not exceeding one hundred dollars, might be relieved from the requirements of the provisions of Section 3630a to Section 3631, Revised Statutes, inclusive, pertaining to insurance companies, not limited as to amount of benefit. For an insurance company that insures for a practically insignificant amount, the Legislature might well, in its wisdom, relieve from certain burdens imposed upon insurance companies insuring for large or unlimited amounts. And the law is general in its provisions, applicable to the whole state and all the citizens of the state, and all such associations formed within the state.

It is charged, and evidence has been introduced to support the charge, that this association was organized and is being carried on for the profit of another certain corporation confessedly organized and carried on for profit, to-wit, the Toledo Undertaking Company, and that therefore it should not be maintained or sustained as a corporation not for profit. The evidence shows that a short time before this association was incorporated the Toledo Undertaking Company was incorporated and organized; that the latter is a company doing a general undertaking business, and that certain of the officers and stockholders of the Toledo Undertaking Company promoted the incorporation of this association: that they were the incorporators named in the articles of incorporation; that after the organization of this association, a board of trustees of fifteen members of this association was chosen by the incorporators and a large number of those trustees were directors and officers of the Toledo Undertaking Company. The incorporation of this association occurred late in December, 1904. The initial organization was upon the 8th day of January, 1905. The next annual meeting was held upon the 9th day of January, 1906, in pursuance of by-laws adopted, and at that time but little change was made in the personnel of the board of trustees, and it is still composed largely of directors and officers of the Toledo Undertaking Company; and it appears that the course of business of this association has been that a contract was entered into between the board of trustees of this association and the board

of directors of the Toledo Undertaking Company, wherein it was provided that for such funeral as a member would be entitled to, costing not to exceed one hundred dollars, the Toledo Undertaking Company was to receive from this association one hundred dollars; and for such funerals as were to be provided to cost fifty dollars this association was to pay the Toledo Undertaking Company fifty dollars.

We are of the opinion that these facts alone do not amount to an offending against the law by this association, or to such offending as would require the court to oust it from the exercise of its franchises. As before suggested, this association is not, in our opinion, strictly a beneficial organization, and it is clear that the Toledo Undertaking Company is an organization for profit. This association agrees to furnish to its members, or perhaps more properly stated, the members of this association agree among themselves to furnish one another certain funeral benefits, and in the very nature of things, in the carrying out of this provision somewhere along the line, a profit must result to somebody, unless everybody concerned, or everybody dealing with the association, shall be willing to contribute in such a way as that there would be no return of profit.

It is said on behalf of relator that the statute contemplates that certain cash benefits are to be returned to the beneficiaries and from this cash, amounting to no more than one hundred dollars in any case, the beneficiary, or the representatives of the beneficiary, are to be at liberty to go into the open market to provide things needful for the funeral. We do not think that the statute requires this. It seems clear that under this statute it would be competent for this association to furnish the funeral itself, the things needful for the funeral, the service, the properties, the materials, and that if it may do so by providing a stock of such materials, by providing competent employes or servants, necessary equipage, horses, etc., to perform the service, that it may as well do so by employing some independent concern to furnish these things; and therefore if this scheme or plan provided by the contract with the undertaking company is carried on in an honorable, straightforward manner in the interests of the membership, we can not see that the inter-

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ests of the members or the public are likely to be so injured or affected as to call upon the court to interfere. Nor do we think that the circumstance that stockholders, directors or officers of the Toledo Undertaking Company are also members of this association and have become trustees and officers of this association, in and of itself, or in connection with the fact that the contract referred to has been entered into between the association and the company is sufficient to require interference at the hands of the court. If, however, it should turn out at any time that this association is merely a subsidiary organization dominated and controlled by the Toledo Undertaking Company, then a different problem would be presented to the court. It is charged that that is so now. We are inclined to think that as the association is at present organized that may result, and therefore we feel it our duty to require at least a modification of the plan of business of this association, and what that shall be I shall discuss more at length presently.

It is charged that there were irregularities and omissions of statutory requirements in the mode of procedure in the organization of this association. We are of the opinion that there were some omissions, some irregularities, but not so vital to the organization or to the association as to require a judgment of ouster. It is apparent that the gentlemen who had the matter in charge proceeded in good faith to attempt an organization upon the lines required by the statutes. Whatever omissions may have occurred were because of inadvertence, not because of any design to evade the requirements of the law, and therefore we think this should be recognized as a *de facto* organization, and that the present board of trustees should be recognized as at least the *de facto* board of trustees, and authority for this is found, we think, in the case of *Bartholomew v. Bentley*, 1 Ohio State, 37.

The evidence also indicates that there was a later meeting which purports, according to the records, to have been a meeting of members of the association, and they appear to have ratified this election, though perhaps that was not necessary. Certain so-called by-laws were adopted—the by-laws set forth in the petition. These so-called by-laws are not within the meaning of Section 3250, Revised Statutes, such rules of government as trus-

tees were authorized to adopt, for the trustees or directors of a corporation may adopt a code of by-laws for their government only, not for the government of the association, and such by-laws must not be inconsistent with the regulations of the corporation or the Constitution and laws of the state, and such by-laws the trustees may change at their pleasure. But the regulations of the association, the fundamental law of the association, subordinate to the Constitution and laws of the state, must be adopted by the members of the association, if a corporation not for profit; and that is provided for in Sections 3251 and 3252 of the Revised Statutes. The incorporators met and proceeded in pursuance of Section 3240, Revised Statutes, to choose a board of trustees consisting of fifteen members. The statute provides that trustees so chosen shall hold until the next annual meeting or until their successors are elected or qualified.

These so-called by-laws are really what the statute contemplates as the regulations. Section 3252 provides that these regulations may cover:

“1st. The time, place, and manner of calling and conducting meetings.” That is, the meetings of the association.

“2d. The number of stockholders or members constituting a quorum.

“3d. The time of the annual election for trustees or directors and the mode and manner of giving notice thereof.

“4th. The duties and compensation of officers.

“5th. The manner of election or appointment and the tenure of office of all officers other than the trustees or directors.

“6th. The qualification of members, when the corporation is not for profit.”

Now all of these things, or all that are applicable to an association not for profit, are provided for in these so-called by-laws. Manifestly it was not competent for the trustees to adopt such regulations. It is said, however, on behalf of the defendant that these regulations were adopted by the members, but who the members were and how they became members at that time is not apparent to us. Section 3241 provides:

“The subscribers of the articles of incorporation shall cause the same to be copied into a book which they shall provide, and which shall be the property of the corporation; and a person

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having the qualifications prescribed by the corporation may become a member by subscribing his name to such copy.”

The articles of incorporation themselves do not indicate what the qualifications of members shall be, and we suppose that it is competent to collect a membership in some way and then allow that membership, in the adoption of regulations, to provide the qualifications of members, and if in the adoption of such regulations they provide qualifications which may exclude some of those who were tentatively members at the time of the adoption of the regulations, the members thus failing in qualification must drop out. These articles of incorporation were not copied into a book and subscribed by the members. Whether that is absolutely essential to the legal organization of a company we are not prepared to say, but it does seem to us clear that in the preliminary organization the books, papers and records of the association should set forth clearly and distinctly who the persons claiming to be members were, who were present, who did in fact adopt the regulations and perfect the organization, and that ought not to be left uncertain or open to doubt, though to us these books leave it so. It is quite uncertain to us whether this membership consisted of anybody else or any other persons than the incorporators and perhaps the trustees that the incorporators had chosen. I do not mean to be understood as saying that they alone might not have constituted a sufficient membership acting as members, if they had at that time become such, to organize the association. But in view of our conclusions in the case I think I will not carry this discussion any further. I will modify what I have said about it appearing that the organization was irregular by stating it in another form, *i. e.*, that it is not apparent to us that the organization was strictly regular. Unless the regulations were properly adopted by the membership the provision found in these so-called by-laws that the annual meeting should be held upon the second Monday of January would not be effective, for the statute provides “that unless the regulations of the corporation otherwise provide an annual election for trustees or directors shall be held on the first Monday in January of each year,” and therefore there would be irregu-

larity in the second election because of its not having been held at the time provided by law.

Some question is made here as to whether the annual election must be held upon the first Monday in January, and counsel for the relator undertake to distinguish between the annual election and the annual meeting provided for in the statutes. We think the same thing is intended by both expressions; that is to say, that the annual meeting is the time when the annual election is to occur, though other business may be done at the time of the annual meeting. But a part of the necessary business of the annual meeting is the annual election, and therefore if the association provides for the annual meeting on a date other than the first Monday of January, necessarily the annual election will come upon that other date. The statute appears to us to use the terms in this interchangeable way, or at least to use the term "annual meeting" as including the time of the annual election. For instance, in Section 3240, "a majority of the subscribers of the articles of incorporation formed for a purpose other than profit, may elect not less than five trustees of the corporation who shall hold their office till the next annual meeting," which evidently means the time of the next annual election. And then in Section 3246, "unless the regulations of the corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday in January of each year; if trustees or directors are, for any cause, not elected at the annual meeting, or other meeting," then it provides what shall be done.

It appears by these so-called by-laws under which the association is operating, that the funds from which to provide these funeral benefits are raised by the collection from the membership of what are called initiation fees and dues. The membership is divided up into three classes. The initiation for one class, Class A, is ten cents and dues eighteen cents a month. The initiation fee for Class B is eighteen cents, and members of Class B pay no dues. The initiation fee for Class C is eighteen cents, and members of this class pay no dues, but they do not participate in the funeral benefits; that is to say, they have no right to a funeral costing one hundred dollars or fifty dollars, or

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any other amount, but they are accorded certain privileges in the way of discounts on bills for goods furnished and services rendered.

It is said on behalf of the relator that these provisions for initiation fees and dues do not comply with the statute which provides for such associations and for such benefits as the result of assessments made upon the members and collected from them. The statute authorizes "an association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such association by assessments upon such members," etc. It is said that these initiation fees and dues correspond very closely to the fees and premiums required of persons insured in what are called the old line or stock insurance companies, and that they are not assessments. In *State v. Fire Assn.*, 42 Ohio State, 555, where the court had under review a statute our Supreme Court, where the court had under review a statute requiring that the funds should be raised by *special* assessments, it was held that members were liable to be specifically assessed, from time to time, to pay losses which occur while they are such; but no member is liable to such assessment to pay losses occurring before he became a member, or which may occur after he ceases to be a member. That was a case of fire insurance under the assessment plan. And in *State v. Ins. Co.*, 58 Ohio State, 1, and some other cases decided by our Supreme Court, it is held that life insurance companies based on the assessment plan must, under our statutes, rely for their funds chiefly on post-mortuary assessments, assessments made and collected after the death occurs, after the loss, from the surviving members; and our impression is, from a study of the authorities, that at one time by the statutes of this state upon the subject of mutual life insurance companies or associations that method of assessing and collecting was required. The statute, however, has been modified by a provision authorizing such companies to collect not only for the purpose of paying losses as they shall occur, but for the creation of a fund—I refer to Section 3630, Revised Statutes—which may be accumulated and invested, and that provision was added to Section 3630 by an amendment adopted in 1886, found in Volume 83 of Ohio Laws, at page 161, and whether such strict method of

post-mortuary collections and assessments would be required now may be open to grave doubt. We find no decisions since this amendment of the statute. I am not certain that it was ever required strictly in all cases, and counsel for the relator in his brief handed in yesterday seems to concede that a plan whereby certain stated payments are required of the membership, annual payments or quarterly payments or monthly payments, would not be obnoxious to the statute if a provision by which it should appear that the payments were going to provide a surplus, fewer would be required, or if there were to be a deficit, a greater number would be required, were made a part of the regulations. We think this might be made a part of the regulations subsequently to the adoption of the original plan omitting it, so as to bind the whole membership under the proviso in the regulations that they shall be subject to amendment, but upon that we express no fixed opinion at this time. At all events, if that were done, the regulations and any contract thereunder should distinctly set forth that the right to make such alteration is reserved and that an increased liability thereunder may arise. As these regulations and the contracts thereunder stand they seem to carry an assurance that the amount of the dues will never be increased.

A matter not presented to us by counsel for the relator has seemed to us worthy of much consideration, *i. e.*, a question touching the qualification of members. By the rules adopted, those persons known in law as infants may become members of this association—persons incompetent to contract, not *sui juris*. It is provided in Article VIII as to membership that the members shall be divided into three classes, namely, Class A, Class B and Class C. Class A shall include persons in good health between the ages of ten years and sixty years; Class B shall include children in good health between the ages of one and ten years; and Class C shall include persons over sixty years of age. Then Article IX provides as to the initiation fees and dues. The initiation fee for Class A shall be ten cents, and dues shall be eighteen cents per month, payable on the first day of each month, and unless paid on the first day of each month said member shall be in arrears. The initiation for Class B shall be eighteen cents, but there shall be no dues paid in this class. It is necessary, how-

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ever, that parents or guardians be members of Class A before their children are entitled to membership in Class B. The initiation for Class C shall be eighteen cents, and there shall be no dues paid in this class.

Article X.—Funeral Benefits. The members of Class A in good standing at time of death shall be provided a funeral, consisting of embalming, professional services, casket and outside box, suit or robe and funeral car, to the value of one hundred dollars.

Members of Class B, whose parents or guardians are in good standing in Class A, shall at death be entitled to a funeral to the value of fifty dollars as shown in Class A.

Members of Class C shall at death be entitled to a discount of twenty per cent. on their funeral bill.

Now, it has seemed to us that the Legislature did not contemplate that an association of this character might be organized and carried on by children. I quote from Clark & Marshall on Private Corporations, page 127: "Unless expressly permitted by statute, an infant can not become one of the incorporators in forming a corporation, for at law he is incapable of making a binding contract. Infants need not be expressly excluded by the statute, for it will be presumed that the Legislature in authorizing persons to form a corporation contemplated such persons only as are *sui juris*." And we think that in providing for membership in an association, where the members are in control, where the members formulate and direct the policy of the association, the statute contemplates that they shall be persons competent to contract—not necessarily persons entitled to exercise the elective franchise, but persons who are presumed in law to be capable of entering into ordinary contractual relations and assuming contractual obligations.

The only case to which our attention has been brought that appears to be directly in point is the case of *The Chicago Mutual Life Indemnity Association et al v. George Hunt, Attorney-General*, found in Volume 127 of the Illinois Reports, at page 257, and this does not support our views upon this question at all, but it is directly opposed thereto. This was an action to oust the association from the exercise of its franchise and one of the

charges relied upon was that minors were members. I shall read from the opinion at page 276, as follows:

“One of the charges upon which considerable stress is laid and upon which the court below found in favor of the Attorney-General is that of admitting minors to membership.

“The statute requires that the certificate of association shall state, among other things, ‘the limits as to age of applicants for membership,’ and in pursuance of that requirement, the certificate of association in this case, which was submitted to and approved by the auditor and by him transmitted to the secretary of state and upon which the latter issued the certificate of organization, provided that ‘no person shall become a member who is under ten or over seventy years of age.’ It appears from the evidence and the defendants’ admissions that, of about six hundred members belonging to the association, something over sixty were admitted under the age of twenty-one years, some of them being but little past the minimum age. Was their admission unlawful?

“The statute under which the association was organized is silent on the subject, nor do we find any statute which either expressly, or, so far as we can discover, by implication, either permits or forbids their admission to membership. If then minors are ineligible, such ineligibility arises from some principle growing out of the nature and objects of these associations. or the policy of the law applicable thereto.

“The contention is, that the certificate of membership is a personal contract between the member and the association, and that, as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. We may admit in the broadest sense that these societies are founded upon the principle of entire mutuality in relation to burdens as well as benefits, yet we are unable to see how that principle places the membership of infants upon any footing different from that of adults. While the certificate of membership is a contract, such a contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void and the membership ceases. But the making of an assessment or the maturing of dues does not make the member a debtor to the association, so as to authorize it to bring

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a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion. The contract then not being one which has the legal effect of binding him to the payment of any money or the performance of any condition, we can not see how it can be at all important whether it is voidable or otherwise. Performance is no more left to the option of the member where the contract is made by an infant than when made by an adult. If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all. We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid.

“Nor are we able to see any force in the suggestion that minors should not be admitted to membership because of their incapacity to act as trustees, or to perform the duties of members at corporate meetings, such as consulting or giving advice for the mutual benefit of the members, voting for officers and the like. We know of no reason why the capacity to act as trustee should be a necessary qualification for membership. If a sufficient number of members possess the requisite capacity, so as to afford the members a reasonable and proper range of choice in the selection of trustees, the admission of others who are not thus qualified can work no injury to anybody. It will not be claimed that the want of the requisite intelligence or business experience on the part of an adult to qualify him to act as trustee would render him ineligible to membership, but these are quite as essential to the proper discharge of the duties of trustee as mere legal capacity. There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising or even voting. The only objection to their doing so grows out of their inexperience and the immaturity of their judgments, but these are disqualifications which are not necessarily confined to persons under the age of twenty-one years, and no one would allege them as a legal bar to the admission of an adult to membership.”

We have to say that that reasoning does not satisfy us. In this decision, the court seems to overrule a judge who is regarded as one of the ablest equity judges of the country, Judge M. F. Tuley, of the Circuit Court of Cook County, Illinois, and what the judge delivering this opinion has said here is entitled to less weight as a decision than it would otherwise have, from the circumstance that it was unnecessary to the decision. The decision

made by Judge Tuley ousting the corporation was affirmed by this court, and the court is simply proceeding to say that they do not regard this particular charge as having been sustained.

It is said that the mere inexperience of an adult, or the mere lack of capacity of an adult, would not be a disqualification. Generally, perhaps, that is true; and yet that is not always true. Incapacity may arise to a degree that would render the adult incapable or ineligible; in other words, it would hardly do to organize an association of this character at the insane asylum from the members thereof. If the adult were shown to be *non compos mentis* no doubt he would be ineligible to membership. And an infant is presumed and regarded in law as without capacity to contract or manage his own business or affairs. The legal disability is laid upon an infant for that reason; and if we are to admit infants, where is the line to be drawn, or how can any line be drawn? Here, one class is made up of infants ranging between the age of one year and ten years. Another class, a part of Class A, is made up of infants ranging between the ages of ten years and twenty-one years. If it is competent for an association to organize with classes of that description, it is competent for an association to be organized with no other membership than persons of that description. It would be competent, then, to organize burial associations of this character made up of infants between the ages of one year and ten years, or, if you please, between the ages of one year and twenty-one years. Surely the Legislature could not have contemplated anything that would operate so absurdly and so disastrously to the interests of all concerned as that. And it will not do to say that there may be enough adult members of business capacity to take care of the interests of the infants, for the reason that these infants are members with like rights and privileges in the association as the adults. They have the same right to vote; they have the same right to hold office; they have the same right to be trustees. It would be different if this statute provided that guardians or parents might become members of the association on behalf of their wards or their children, and so manage their affairs and provide for their burials. But it does not. The statute provides for a membership of persons who are to participate in the business of

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the association and who are to have the funeral benefits; but no others are to have the funeral benefits than the members and all the members have a right, each and every one of them, to participate in the business of the association.

We must draw a line somewhere; it will not do to say that infants in arms, sucking babes, can become members of a legal organization of this kind, with the right of franchise and the right of management. And if we are to draw the line we think the logical, the reasonable, and the legal basis of that line is to be at majority.

I have already intimated our opinion that the funeral benefits are confined to the membership, and we think that the funeral benefits must be confined to the contributing members, those who pay by assessment, whether that assessment be in the form of dues or in some other form; and while it might be very laudable for the young, healthy and well-to-do to organize for the burial of the old people, or those in poverty, this statute does not provide for that. This statute contemplates mutuality in the matter of benefits and in the matter of burdens. And that brings me to a consideration of Class C. Class C, as I have shown by reading from the by-laws, is made up of persons over sixty years of age. They pay an initiation fee of eighteen cents. They pay nothing thereafter; nothing more. It is said that no harm results from this, because the fund raised by assessments upon the others, or by the dues paid by the others, does not contribute to the expense of the burial of the members of this aged class, and that is apparently true. But the statute does not provide for such a class. The statute does not provide for this form of benevolence. The statute only authorizes an association made up of members and for one providing "for the payment of the funeral expenses of the members of such association by assessment upon such members," which means *all* the members. And we think that it is not competent to provide for a class who shall not contribute or provide for their funerals, either out of a fund provided by others or in any other way.

While, as I say, such benevolence may be a laudable thing, while it may be beneficial in some of its aspects, it is not a thing on account of which persons may become incorporated under the laws

of the state; it has not the sanction of this statute as one of the purposes of an incorporated company. If people desire to act together as an unincorporated association to do business of that sort, we can not see why the business should be interfered with or why it would not be most praiseworthy, and the same would be true of an incorporated company if authorized by law. These persons in Class C are members, made members by the by-laws, and when the membership meets to amend their by-laws the members of Class C may take a notion to provide differently as to the source from which the expenses of their funerals is to come. They have the same right to vote in the election of trustees and in determining the management that the others have. But we need not anticipate such difficulties to justify our conclusion.

As to infants in Class B, that is, those between the ages of ten years and twenty-one years there is the objection that they are not only disqualified because of non-age, but the further objection that they are members who pay no dues and yet participate in the fund raised by the contribution of the dues of others, and we think the statute contemplates, when it says that such funds are to be raised by assessments "upon such members" that it is to be an assessment upon all the members. There may not be a class the members whereof shall be excused from contributing.

This court discovers no reason to doubt the honesty or good faith of the gentlemen who have been trying to forward this enterprise. They have been operating in a new field. They have been blazing the way, and it is rather to be expected that mistakes would occur. There may have been some others, that the court has not pointed out, but we have indicated those that we regard as serious.

We do not feel disposed to oust this corporation from the exercise of its franchises without giving it an opportunity to undertake to correct these errors; by reorganizing upon a new and acceptable plan. It is not for this court to undertake to formulate a plan. We might, and very likely would, make mistakes as grievous as those that were made by the gentlemen who did undertake it. It is only for us to consider the plan after it is formulated, and we have to deal now with the plan that is exhibited to us here and none other.

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The decree will oust the corporation to this extent: First. It will require that Class C must be dropped, because the funerals are not paid for by assessments on such members, as provided by the statute. Second. It will provide that Class B must be dropped, because the funerals of persons in that class are not paid for by assessments on all members, and also because infants are not qualified by law for membership. Third. All of Class A who have not attained their majorities must be dropped because not qualified by law for membership. Fourth. The election of trustees must be set aside, because persons not qualified by law were part of the elective body. That statement is based upon the assumption that all of the membership participated in the election as they had a right to do. Notice must be given as required by statute, to the remaining members, calling them together to elect trustees and to adopt a code of regulations. These regulations must provide for raising funds for funeral benefits by assessments on all members, and for funeral benefits to none but contributing members. Whether the present plan of monthly dues meets the requirements of the statutes as to assessments or is obnoxious to the objection that it does not provide for an equitable pro rata distribution of burdens, or may result in a deficit or a surplus in contravention of law, is not decided, since the new plan to be adopted may be upon different lines; nor is it determined whether medical examination or other means of assuring a membership with reasonably sound bodies and good health and ordinary expectancy of life at their respective ages shall be required, for the same reason. That is to say, the new plan may obviate this inquiry.

All costs will be adjudged against the defendant.

I should add that when these members are brought together for the initial organization (for it will amount to that now), some plan should be devised, either by the members signing the book containing the articles of incorporation or otherwise, by which a definite record shall be made of the membership present and participating in the business of the association.

Lyman W. Wachenheimer, Prosecuting Attorney, and *Denman & Crane*, for relator.

J. P. Hanley, for defendant.

INADMISSABILITY OF UNPROVED PAPER WRITINGS.

[Circuit Court of Cuyahoga County.]

ANNA BUNNER ET AL V. EDWARD S. ISON ET AL.

Decided, December 22, 1905.

Evidence—Paper Writings—Where Execution of, is Denied—Are Inadmissible, Unless—Rule as to Ancient Instruments—Correct Rulings on Incorrect Grounds.

1. A paper writing is not admissible in evidence, where its execution is denied by the answer, and no evidence is offered tending to show that it was ever in fact signed by the parties whose names appear as the subscribing witnesses.
2. The fact that a paper writing bears date forty years prior to the time it is offered in evidence does not, standing alone, bring it within the rule as to ancient instruments.
3. The giving of a wrong reason by a trial judge for the exclusion of certain testimony would not be ground for the reversal of the resulting judgment, where the exclusion was itself proper; but in the case at bar the reason given in the judgment entry, that the paper writing was excluded "on the ground that it did not tend to show a legal title in the plaintiffs to the lands in question," is entirely consistent with the finding of the reviewing court as to the inadmissibility of the writing upon which title depended.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

The petition filed in the court of common pleas alleges that on the 25th day of October, 1864, John Leopold was a widower, the father of four children, and Fredericka Kreunberger was a widow, the mother of four children; that these two parties, expecting to become husband and wife, entered into a written contract on said day in relation to certain real estate in Cuyahoga county, Ohio, then owned by the said Leopold. This writing is designated in the petition as a deed of trust. By this writing certain provision was made for the said two parties and for the children of each then living, and for any children that might be born to them in the marriage which was to take place between them.

The said John and Fredericka are both dead. The plaintiffs are children and descendants of children of said John. Two of the defendants are also children of said John, who refused to join as plaintiffs and are therefore made defendants. The other defendants are in possession and claim to own certain real estate described in the petition, which is a part of that contracted about in the writing already mentioned. The plaintiffs aver that they and the defendants Amelia Berchtold and Fredericka Mathews are the owners and entitled to possession of said real estate, and that the other defendants unlawfully keep them out of the possession thereof. The prayer of the petition is for an order of the court decreeing the possession to the plaintiffs and said Amelia Berchtold and Fredericka Mathews, and that the other defendants may be required to account for rents and profits of said premises while the same have been in their possession.

The defendant Foote answers, alleging that he is in possession of said premises and is the owner of same in fee; that the defendant Ison at one time was in possession with him and jointly with him owned said premises. He admits that the premises were formerly owned by said John Leopold, and avers that he is the owner thereof by virtue of the conveyance thereof by said John Leopold and through certain mean conveyances to himself.

The plaintiffs' reply, averring that the conveyance made by John Leopold, upon which the defendant relies, conveyed only an estate for and during the life of the said John Leopold, because of the limitations put upon his title by virtue of the contract or deed of trust of October 25, 1864, hereinbefore mentioned. Whatever title or right the plaintiffs have in these premises depends upon said instrument. They claim under it. That is the writing of October 25, 1864.

A bill of exceptions containing the proceedings on the trial in the court of common pleas is filed here, and it is claimed that there is error manifest in this record.

From this bill it appears that the plaintiffs proved the marriage of said John Leopold and Fredericka Kruenberger; that each had four children at the time of the marriage, as stated in the petition; that no children were born of said marriage; that

both were dead, and that the plaintiffs are descended from said John, as stated in the petition; and then the plaintiffs offered a certain paper writing, a copy of which is attached and made a part of the bill. To the admission of this writing the defendants objected, and such objection was sustained. Exception to this ruling was taken by the plaintiffs. No further evidence was offered and the court, thereupon, gave judgment for the defendant Foote.

It is this ruling upon the introduction of the writing that is complained of. The briefs and the oral argument of counsel on each side deal chiefly with the construction to be given and the legal effect of the writing offered, and show very extensive research by all of them upon some very interesting questions, only one of which, as we view the case, need be considered by the court.

The instrument offered bears date October, 1864, and has attached to it where signatures would properly appear upon a contract, the names J. Leopold, F. Kruenberger, Heinr. Reussman. On the left hand at the end of the writing where the names of witnesses should properly appear and under the words "In presence of" appear the names "C. F. Roll, E. Hessenmueller."

The provisions of the writing offered are such as the petition sets out are contained in the writing or deed of trust entered into between John Leopold and Fredericka Kruenberger October 25, 1864.

The execution of such a writing is denied by the answer. No evidence was offered tending to show that the writing offered was ever signed by these parties whose names appear at the foot of it. Surely it is not sufficient to entitle a writing to be admitted in evidence, that a certain name appears upon it where the name of one whose writing it purports to be would properly appear. As well might one offer in evidence a writing in the form of a promissory note with a name at the end of it, as against such man without showing who signed the note, or a letter with the name of John Doe at the end of it as the letter of John Doe without showing that it was his genuine signature. There is no question, so far as the matter now under

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consideration is concerned, as to whether the instrument offered is one authorized by law to be recorded and therefore provable by the record, because no record was offered. All that was offered was this writing.

Section 6577, Revised Statutes, provides that in actions before a justice of the peace, it shall not be necessary to prove the execution of a written instrument, unless the party to be charged shall make and file with the justice of the peace an affidavit that such instrument was not made, etc. The reason for this is obvious. The cause is to be tried without verified pleadings, and the party relying on the writing should not be put to the expense of proving its execution, unless the party sought to be charged under it is willing to deny its execution under oath. Such is not the case here. The defendant, by his answer in this case, has denied under oath the execution of the instrument on which the plaintiff relied, and the statute itself shows the policy of the law, except for the statute referred to, to require proof in all cases of the execution of the instrument before it can be admitted.

Greenleaf on Evidence, Vol. 1, Sec. 558, states the rule in these words: "In general all private writings produced in evidence must be proved to be genuine," and then follows a discussion of how such proof shall be made. Here, no attempt whatever was made to show that the writing was genuine.

In *Barrett v. Hanshue*, 53 O. S., 482, it is held that the old rule requiring the writing to be proved by the subscribing witnesses was not in force and that the proof must be made by some competent person before the writing can be admitted in evidence.

It is suggested that this might have been properly admitted as an *ancient document*. There is nothing before us to indicate that it should be so treated. True, it bears date forty years earlier than the time at which it was offered, but we know nothing of its appearance or the custody in which it has been or from which it was taken. The rule as to the admission of *ancient instruments* is thus stated in Abbott's Trial Evidence, at page 708:

"An ancient deed or will or other instrument of title may be admitted in evidence with direct proof of execution, when

shown to have come from proper custody and appearing to be of the age of at least thirty years * * * if such account of it be given as may reasonably be expected under all the circumstances of the case and as affords a presumption that it is genuine.”

None of these requisites were shown here.

It is urged that the reason given by the court shows that the exclusion was upon other grounds than those stated in this opinion. If that were true it would not justify a reversal, if there existed any lawful ground for such exclusion. The reason stated, however, in the bill of exceptions is entirely consistent with what has been said. The language of the bill is:

“And the court thereupon sustained the objection and refused to admit said paper writing in evidence and excluded the same on the ground that the same did not tend to show a legal title in the plaintiffs to the lands in question.”

Surely, if, as we have reasoned under the law, it did not of itself tend to show anything except that it was a written paper, the ground stated by the court was entirely proper.

As the plaintiffs could not succeed without establishing the contract set out in the petition, and as there was no evidence tending to show such contract, the judgment for the defendant necessarily followed, and the same is affirmed.

E. Sowers, for plaintiffs in error.

Brewer, Cook & McCowan, Squire, Sanders & Dempsey, J. A. Fenner and *E. K. Wilcox*, for defendants in error.

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**EVIDENCE OF TITLE IN ACTION FOR RECOVERY
OF LAND.**

[Circuit Court of Cuyahoga County.]

REBECCA HELLER v. DAVID R. HAWLEY.

Decided, December 22, 1905.

Adverse Possession—Plaintiff Put to His Proof—Must Show the Better Title—Pleading—Evidence under Claim of Adverse Possession—Prima Facie Case made. How—Charge of Court—As to Use of Words “Undisputed Title” and “Clear” Proof.

1. In an action for recovery of possession of land from a defendant claiming title by adverse possession, it is error to admit evidence which forces on him a claim of title coming from the common source of title.
2. The requisites of adverse possession are that it be “actual, open, continuous, hostile and exclusive” for a period of twenty-one years, and a charge of court is erroneous which includes among these requisites the word “undisputed.”
3. It is sufficient in such a case that the defendant prove by a preponderance of the evidence that his building, which stands in part on his own land and in part on the disputed strip, covers exactly the same and no more ground than it has covered for twenty-one years; and he should not be required by the charge of the court to establish this fact by “clear” proof.
4. It is error to refuse to charge in such a case that, “If the plaintiff has not derived his chain of title to the land in dispute by a chain of conveyances from the government, or from a grantor proved to have been in possession of the land in dispute when he executed the conveyance therefor, your verdict should be for the defendant.”

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

Suit was brought in the court of common pleas by Hawley to recover possession from Heller of certain real estate in the possession of Heller. The petition was in the usual form of a petition in ejectment, setting up that Hawley was the owner, and that Heller was in possession and unlawfully kept him out of such possession.

Heller answered, setting up three defenses:

First. She denied the ownership and right of Hawley. She admitted that she was in possession and averred that she was the owner of the premises in fee simple.

Second. She averred that under a claim of title and by virtue of a warranty deed, she had been in open, notorious, continuous, adverse and undisputed possession of the premises for many years, and that L. E. Holden, from whom she purchased, and who delivered the possession to her, had been in like manner since January 4, 1872, a period of about thirty years before the bringing of the action in open, notorious, continuous, adverse and undisputed possession of the same premises, and that the persons from whom he derived title had been in like possession for many years, and denied the right of the plaintiff to maintain any action for the possession of the premises for the reason that she and those under whom she claimed her title had been in such adverse possession for at least thirty-five years.

Third. She repeats her averments of adverse possession, says that for over thirty-five years she and her predecessors in title, by virtue of deeds duly acknowledged and recorded, have *claimed* the premises and have erected lasting and valuable improvements thereon, with the knowledge of and without interference by the plaintiff or his predecessors in title.

To this the plaintiff replied, denying that defendant was owner in fee simple, and all allegations of the answer which deny the absolute ownership in the plaintiff, and deny the adverse title and possession in the defendant and her predecessors.

With the pleadings in this situation the case went to trial to the court and jury, resulting in a verdict and judgment for Hawley. By proper proceedings in error the case is here for review.

A bill of exceptions is filed here containing all the proceedings on the trial, including the evidence, and the charge of the court to the jury.

It will be seen that the plaintiff was put to the proof of his title, as he must recover, if at all, upon the strength of his title and not upon the weakness of the title of her who was in possession.

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To prove his title the plaintiff introduced records of deeds, showing that at one time one D. W. Babcock had a deed of certain real estate, including the lands here in dispute and other lands which the plaintiff now owns immediately adjoining the same on the east, and also lands immediately to the west of the disputed land, which last named land is now owned by Heller, the land in dispute being a strip five feet in width fronting on Harrison street, now in the city of Cleveland, and extending back seventy-two and one-half feet from said street, so that Hawley is the undisputed owner of the land bounding on the east and Heller is the undisputed owner of the land bounding on the west of the disputed land. Hawley thus having shown such deed in Babcock, showed by proper record that Babcock conveyed by warranty deed a tract including the disputed tract and the lands on the east thereof in 1864, and that through various mesne conveyances the record title which Babcock had is now in Hawley. The plaintiff then offered in evidence record of deeds, beginning with a deed from Babcock in 1866, and showing by this and by mesne conveyances that the record title which L. E. Holden, from whom Heller says in her answer she received her deed and who put her into possession, did not include the land in dispute, but only the land immediately on the west of it, and then the deed from Holden to Heller, executed less than twenty-one years before Hawley brought suit to recover possession, the deed from Holden including the disputed tract. All of this evidence tending to trace the title of Heller back to Babcock was objected to by Heller, but was admitted over such objection. Proper exception was taken by Heller, and it is now urged by plaintiff in error that there was error in the introduction of such evidence.

The defendant in error insists that it was properly admitted, and that by it he was relieved in making proof of his own title from tracing the title back of Babcock. It is not contended by counsel for Hawley but that he must, to make his case, trace title under which he claims back to the government or to one in possession from whom he or one of his predecessors obtained title, or to one under whom both parties claim title. This rule is well

stated in *Middleton v. Westernney*, 7 C. C., 394, the second clause of the syllabus of which reads:

“Where the title of the plaintiff is denied by the answer of the defendant, and possession of the land claimed is, by force of the statute, thereby admitted by the defendant, to entitle the plaintiff to recover he must show a better title to the land in controversy than that of the defendant. A *prima facie* case is made by his showing a conveyance to him or one of his grantors in his chain of title, by one *then* in the possession and occupancy of the land in question. If this is not done, he must run his title by deed or other necessary proof, to some one shown or admitted to be the common source of title to him and the defendant, and in default of there being such common source of title, back to the government. And on his failure to offer evidence tending to do either, it is not error in the trial court to withdraw the evidence from the jury and render a judgment for the defendant.”

See, also, the opinion of Judge Ranney in *Blake v. Davis*, 20 Ohio, 239, in which this language is used, speaking of the plaintiff in an ejectment case:

“Neither he nor those under whom he claims ever having had possession of this land, it was incumbent upon him to show a connected paper title from the government to sustain the action of ejectment.”

That it is sufficient in Ohio that the plaintiff in ejectment show a better title than the defendant from one vendor under whom both claim, is well settled. In *Hart's Heirs v. Johnson*, 6 Ohio, 87, it is said:

“Where both parties' claim to title is based on a common origin, neither can go behind the person from whom they hold or show that his claim is not good.”

In Newell on Ejectment, at page 585, note 4, it is said:

“Where both parties claim title from the same grantor it is sufficient to establish a *prima facie* case to prove derivation of title from the common grantor without proving his title.”

In *Doc v. Lessee of Foster*, 8 Ohio, 87, it is said:

“Where the source of title is common to both parties in ejectment, neither is at liberty to contest it.”

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If, then, in this case, both parties were claiming title through or under Babcock, the plaintiff was relieved from the necessity of going back of Babcock.

The claim of Hawley is that by her answer Heller set up title under deed from Holden, and that therefore she must defend on Holden's title. It is true she pleads a deed from Holden and that she took possession under him, and that the possession of him under whom Holden claimed, and the possession of Holden and her own possession constitute a continuous adverse possession against the plaintiff for more than thirty-five years, but she nowhere asserts that either Holden or any predecessor of his had a good title, but only that they *claimed* title. All title passed out of Babcock to the lands now owned by either the plaintiff or defendant more than thirty-five years ago. Heller does not in her answer assert a good title in any one but herself, and she says that this title is founded on adverse possession.

The evidence under discussion sought to force upon her a claim of title coming originally from Babcock. The evidence properly admissible under these pleadings is exactly what it would have been if Heller had simply denied the plaintiff's title. See *Kyser v. Cannon*, 29 O. S., 359; *Rhodes v. Gunn*, 35 O. S., 387. From what has been said, it follows that there was error in the admission of the records showing title by mesne conveyances from Babcock to Heller.

Complaint is made of the charge of the court in the use of the following language:

“By the claim of adverse possession the defendant and her predecessors must have been in open, notorious, continuous, adverse and undisputed possession of the land for twenty-one years in order that she may have the right thereto.”

We hold that the word “undisputed” should not have been used. The fact that the plaintiff or any other owner “disputed” the defendant's right to occupy would not of itself interfere with the running of the statute of limitations. The requisites of adverse possession are that it be, as stated by Judge Follett, in the opinion in *Dietrick v. Noel*, 42 O. S., 21, that it be “actual, open, continuous, hostile and exclusive.”

See, also, *McAlbister v. Hartzell*, 60 O. S., 69, and Vol. I, *Cyclopedia of Law & Procedure*, page 981, where it is said that the possession must be “actual, visible, exclusive, hostile and continued during the term necessary to create a bar under a statute of limitations.”

The court further charged:

“The burden is upon her to prove the facts necessary to sustain such plea”—of adverse possession—“and to be available must be clearly proved by the greater weight of the evidence and not left to mere conjecture.”

Again, the court, after saying what constituted adverse possession, says, “if the defendant has clearly proven this by the greater weight of the evidence, then your finding should be in her favor.”

We think the word “clearly,” as used in these two paragraphs, was calculated to mislead the jury as to the amount of evidence required of the defendant.

There was no question, under the evidence, that the defendant occupied, possessed and claimed to own a building, a part of which was upon land which she unquestionably owned and which extended over, upon and covered the disputed tract; that the possession as it now is of the defendant is such that if this building stands now where it has stood for more than twenty-one years, covering just the same land and no more than it has covered during all that period, then the defense of adverse possession is sustained, and, so far as the length of time that the building has occupied its present position, it was sufficient that the defendant establish it by preponderance of the evidence. We are not prepared to say that the court so far erred in the use of the word “clearly” as would justify a reversal on that account, though the charge would have been better without it.

It follows from what has been said relative to the admission of evidence, that there was error in the charge of the court, that if plaintiff and defendant held from a common source of title, “then the defendant would be estopped from denying title thus derived from a common source,” because, with the evidence excluded which we hold should have been excluded, there was no evidence to which this part of the charge could apply.

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It follows, too, that the court should have charged in substance as he was asked to do by the defendant in her third request, that "If the plaintiff has not derived his chain of title to the land in dispute by a chain of conveyances from the government, or from a grantor proved to have been in possession of the land in dispute when he executed the conveyance therefor, your verdict should be for the defendant."

We find no errors in the record justifying a reversal of the judgment, except such as are pointed out in this opinion, and for the errors so pointed out and for no other, the judgment is reversed and the case remanded to the court of common pleas.

Arnold Green, for plaintiff in error.

Solders & Solders, for defendant in error.

INJURY TO INFIRM PASSENGER ATTEMPTING TO ALIGHT FROM CAR.

[Circuit Court of Wood County.]

THE TOLEDO, BOWLING GREEN & SOUTHERN TRACTION COMPANY
v. GEORGE MCFALL.

Decided, November 29, 1905.

Negligence—Degree of Care Incumbent upon a Carrier—With Respect to an Infirm Passenger—Disability of Passenger not a Basis for Defense of Contributory Negligence, When—Charge of Court—Verdict.

1. The care to which a traction company should be held, with reference to a passenger who is alighting from a car, is that degree of care which is commensurate with the circumstances and the danger to be apprehended; and where an aged and infirm man, who is unattended, notifies the conductor as to the point at which he wishes to get off, and adds a caution against starting the car before he is off, more attention is demanded and should be given for his protection than in the case of passengers not so aged and infirm.
2. The fact that an aged and infirm passenger may have been himself negligent in attempting to travel alone, does not relieve a carrier

having knowledge of his condition from liability for its own negligence with reference to him.

3. Contributory negligence can not be based upon the fact that an infirm man, injured while traveling alone, was receiving a government pension for total disability.
4. A verdict of \$1,200 for the injuries shown to have been sustained by the plaintiff, under the circumstances of this case, is not excessive.

WILDMAN, J. (orally) ; PARKER, J., and HAYNES, J., concur.

In this case a petition in error is filed in this court to reverse the judgment of the Court of Common Pleas of Wood County, the petition alleging the general grounds of error found in this class of cases, the case being one for the recovery of damages for personal injury. A motion for a new trial was filed in the court below, and was overruled, and the overruling of it is made one of the grounds of error. It is claimed that the verdict is against the weight of the evidence, that it is excessive, and that the court erred in refusing to give an instruction asked for by the defendant below, the plaintiff in error here.

The case was brought by George W. McFall against the traction company, alleging that on the 20th of January, 1904, it was the owner of a line of railway, operating electric cars, between the city of Findlay, in Hancock county, and the city of Toledo, passing through divers villages named in the petition, among which was the village of North Baltimore. It is said that the line entered North Baltimore on its way north from the east part of the village, on Water street, thence going north on Main street. It is alleged that on the date named, the plaintiff was a passenger on one of the defendant's north bound cars, having boarded the car as a passenger on Main street in the city of Findlay, at about three o'clock in the afternoon, and paid his fare to North Baltimore, where he then resided; that he arrived at North Baltimore about four o'clock in the afternoon, and that the car stopped on the south side of Railroad street at the intersection of Main street and said Railroad street for the purpose of letting plaintiff and other passengers off; that the place where the car stopped was a regular stopping place for the letting off

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and taking on of passengers; that a number of passengers alighted from the car, and plaintiff attempted to do so and thus incurred the injury which is made the basis of the action.

About the same time, and before the car had fairly started, the conductor of said car, it is averred, in disregard of his duty as such, and without paying any attention to plaintiff and the other passengers and without stopping to see that they alighted safely before said car was again started, left the car and ran north on the east side thereof to a point on the east side of Main street and immediately north of the main track of the Baltimore & Ohio Railroad, where a derailing post is located, a distance of about a hundred feet from where the car stopped, for the purpose of pulling the lever on said derailing post in case the way was clear on said Baltimore & Ohio Railroad, and allowing defendant's car to come north across the tracks of said Baltimore & Ohio Railroad. As soon as the conductor of the car reached said derailing post, without looking back to his said car, although he then and there had a clear and unobstructed view of the same and of the rear end thereof on the east side, and without giving plaintiff a reasonable and sufficient length of time to descend from the car, he pulled said lever and motioned to the motorman of the car to come ahead, and thereupon the car was immediately started. Plaintiff avers that he was an old man, somewhat feeble in health, and slower than the ordinary person in his movements, of all which the said conductor had full notice and knowledge at the time the plaintiff became a passenger on said car at Findlay and thereafter. The petition alleges that at that time there was slush and snow and ice on the streets of North Baltimore, and some had accumulated on the rear of the car; that he attempted to get off the car on the right and east side of the car, and at the rear end where the other passengers who had preceded him had gotten off, and was carefully descending the steps of the car and about to step on the street, when the car was started as aforesaid, and he was thrown violently to the brick paved street, thereby seriously bruising and wounding him on the head and on his shoulders and back and hip, and thereby causing him to receive and suffer a severe physical and mental shock,

and he claims damages for this in the sum of five thousand dollars. He alleges that all this was without fault on his part, and he says further, that prior to the stopping of the car he notified the conductor that he wanted to get off at said crossing, and requested the conductor not to start the car until he got off safely. but that the conductor, in disregard of plaintiff's right and his said request, and in disregard of his duties as such conductor, and by reason of his negligence, caused plaintiff to be thrown from the steps of said car and injured.

The answer, which I will not stop to read, denies any negligence on the part of the traction company, and avers contributory negligence on the part of the plaintiff.

The first question to be considered is, whether the claim of negligence as against the defendant company is so far sustained by the evidence as to justify the finding of the jury in favor of the plaintiff. The jury rendered a verdict for the sum of twelve hundred dollars, which the court below, in overruling the motion for a new trial, permitted to stand.

Among the items of evidence in the case was a deposition of the plaintiff, in which he testified as to his recollection of the transaction, and among other things he says, that when he entered the car he was helped into it by one or two parties named, and it appears also further in the deposition that the conductor himself rendered some assistance in placing him in or taking him to a seat. He says, "I told the conductor I guess I would get off here. and that I did not want him to start the car until I was off, as I had seen several parties thrown there by the car starting before they were off." Now, the latter part of this answer is of no consequence, but the statement that he told the conductor that he desired to alight from the car at this place, and wished to have sufficient time to get off, coupled with the observation which was open to the conductor as to his age and condition, were fairly to be taken into account by the jury as matters which invited the attention of the conductor to the necessity and duty of using proper precaution to avoid injury to an old man. He was not altogether helpless, but while able to move about, to walk and get on the car and probably to alight without assistance, his condi-

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tion was still such that it would seem to demand something more than the attention that would be properly given to an ordinary passenger of younger years and greater physical capacity.

There is some disagreement in the evidence as to the precise manner in which the old man received his injury. The car was started as he was either entirely off the car so far as his feet were concerned, or, while one foot was on the lower step and his hand still on one of the handrails in apparent attempt to steady himself in alighting. It does not seem to the court that it is of very much consequence what was the precise method in which he received the injury, if his fall was caused by the negligent starting of the car. Whether he had his hand upon one rail or the other; whether his feet were entirely disconnected from the car or not, are not matters of great moment if he was still so in contact with the car with either hand or foot upon it that the sudden moving of the car was likely to throw him to the ground and cause an injury. It is not strange that witnesses do not remember such matters precisely alike. Not only may there be variations in memory, but opportunities for observation are not just the same. The witness who described the plaintiff as falling backward, and just before the fall having still one foot upon the lower step of the car, seems to have had better facilities for observation than the witness who testifies that the old man was entirely free from the car so far as his feet were concerned. There was one other witness who was not sure whether his feet were upon the ground entirely or not. But as I say, that is not of great moment. The main question is whether the conductor used the care which should have been used by a conductor in charge of a car in the protection of the passengers upon his car towards whom the company owed the duty of protection.

While the company was held to only ordinary care, that care should be commensurate with the circumstances and with the danger to be apprehended, and manifestly some higher degree of care—not of a different kind, but care commensurate with the danger, such as should be accorded to a man of infirm body and old age.

There is another question in this case. The plaintiff in error argues, substantially, that the fact that McFall was receiving a

pension for total disability, is evidence of negligence on his part; that he ought not to have been traveling alone and unattended; that he was in such condition that he should have had a constant attendant, and that the pension would never have been allowed except for that necessity. But that is a matter between him and the government. If he has been receiving a pension for more than he would be entitled to, manifestly, the company could not recoup for that fact. It is but evidence in its bearing upon the question as to the extent of his disability and on the claim of contributory negligence. But even if he were negligent in this respect, as claimed, if the conductor knew the fact that he had no attendant and saw his condition, he was guilty of negligence in not caring for him and not paying attention to him. We do not think that if before that time the plaintiff had been guilty of negligence in entering the car, it would be such contributory negligence as would bar a recovery under the circumstances.

Without going any further into the details of the case, so far as the question of negligence is concerned it is sufficient for us to say that we think the verdict of the jury was justified by the evidence. There was nothing to indicate to their minds that the old man failed to exercise such care as men in his condition of mind and body would ordinarily exercise under like circumstances, but on the other hand, we think that the evidence did fairly tend to show that the conductor did not pay sufficient attention to the condition of this old man and the difficulty he might have in alighting from the car, and that the conductor too hastily notified the motorman to move ahead with the car.

The only question remaining is, as to whether the court properly instructed the jury, or properly refused a special request for instructions asked by plaintiff in error, and also as to whether the damages were excessive. The defendant below made three requests for instructions; two of them the court gave, and we think that the charge of the court on the whole was sufficiently favorable to the defendant. The court charged as to what would be ordinary care; that is, he defined it. There was no instruction as to the duties of the railway company to its passengers generally, but there was one paragraph defining the duty of the conductor as to a man of infirm body and old age. We think that it

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was a fair charge. So far as the refusal to give one of the three instructions is concerned, that request was so complicated that we think that the court was justified in its refusal as misleading to the jury, and that in the second request asked and given, the defendant obtained everything to which it was justly entitled.

It was urged upon the court, in oral argument and in brief, that the damages were excessive. The old man had been afflicted for many years, probably ever since his service during the war, with chronic diarrhoea, and one of the claims was that that disease had been very much aggravated by this injury, so that he was no longer able to control the action of his bowels. There is evidence given by the wife of McFall, and also by a girl who was employed in the household, that ever since the injury his mind seemed to be affected seriously, and indeed, one of the physicians who testified in the case, says that he had delirium. The extent of the injury is not very easy to determine with exactness. The amount of pain that the man suffered, mental and physical, was proper to be considered by the jury in view of the general claim of damage, and in addition to all this there was the claim in the petition that he had incurred medical expense necessitated by the injury to the extent of a hundred and fifty dollars. The doctor who testified as to services rendered after the injury, stated that his fees might amount to two hundred dollars, although he was not very definite as to just the time of the treatment. Whether the estimate covered any service before the injury and not made necessary by it, may be a question. Considering all the circumstances we see no reasons for disturbing the verdict upon the ground that it was excessive. Surely there is nothing to indicate passion or prejudice. It is true enough that the sympathies of the jury might well be aroused by the circumstances of the case, but they do not seem to have been led into any extravagance in the assessment of damages.

The judgment of the court is that the verdict below should stand and the judgment of the court of common pleas be affirmed.

Jas. A. Bope and *Jas. O. Troup*, for plaintiff in error.
W. H. McMillen, for defendant in error.

VALIDITY OF A STREET RAILWAY GRANT.

[Circuit Court of Cuyahoga County.]

WILLIAM M. RAYNOLDS ET AL V. THE CITY OF CLEVELAND ET AL.

Decided, February 26, 1906.

Street Railways—Provision of Granting Ordinance—As to Publication for Bids—Amendment Declaratory of Compliance with Original Ordinance without Effect—Estoppel against Municipality—From Denying the Existence of Facts theretofore Declared to Exist—Provision as to Transfers not Unreasonable—Duty of Council—Rights of Grantee—Good Faith.

1. Defects in a street railway franchise can not be cured by an amendment to the granting ordinance, which merely sets forth the facts as to what was done in the matter of publication of notice before the bids were received for the construction of the line, and declares that the publication was sufficient to meet the requirements of the granting ordinance.
2. A municipality may be estopped by its own acts; it can not deny the existence of facts which, by the action of its duly authorized officers, have theretofore been declared to exist, when such facts are necessary to authorize the doing of some other thing which has misled another to his prejudice.
3. A requirement as to the giving of transfers is one which council has a right to make, and is not rendered unreasonable by the fact that a company operating street railway lines intersecting the proposed line would be thereby placed at a disadvantage in the bidding.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Heard on appeal.

It would not be a profitable use of time to go into a full statement of the facts in this case. They are known to counsel in the case, and indeed to the public generally, having received much attention in the newspapers of the city.

The first matter to be considered is a motion, made by the plaintiff, to strike from the amended answer so much as sets up the facts in regard to the amendment of the ordinance of September 9, 1903, designated Ordinance No. 42846, the date of said amendment being January 11, 1904, the same being

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approved by the mayor on the 12th day of January, 1904. This amendment sets out the real fact as to what was done in the matter of publishing notice before bids were received for the construction of a street railroad on Dennison avenue, and then declares that the publication of the ordinance establishing the route, for two consecutive weeks, and the several newspaper items published in regard to the matter was a sufficient compliance with the requirements of Section 2 of the establishing ordinance, requiring notice for bids to be published for three consecutive weeks, and that these publications sufficiently apprised the public of the time when bids would be received, and then proceeds again to grant the franchise for the construction of an electric railroad on Dennison avenue to Albert E. Green, upon his acceptance in writing of the terms of the grant within ten days after the passage of the amendment, and that he did so accept within the time specified.

This suit was begun on the 11th of January, 1904, the very day on which this amending ordinance was passed, and the day before it was signed, and so, of course, before it could be published and take effect. We do not understand that any defects which existed in the defendant's franchise would be remedied by the passage of this amendment. If the defendants can not stand upon the facts as they existed at the time the suit was brought, they can not stand upon the facts supplemented by this so-called curative amendment, and the motion to strike the same from the amended answer is sustained.

Upon the merits of the case we are in accord with what was said in the court below upon several of the propositions, and could not hope to more clearly express or give more cogent reasons for the conclusions reached than are found in that opinion. We refer in this to the matter of the western terminus of the proposed route, requiring of a deposit of \$10,000 by the successful bidder, with provision for its forfeiture, and the necessity for the publication of the notice provided for in the second section of the establishing ordinance. We do not concur in what is said in that opinion as to the provisions of Section 8 of the establishing ordinance, which reads:

“Section 8. The fare for which the bidder proposes to carry passengers shall entitle the passenger to one continuous ride in the same general direction, and each passenger shall be entitled to one transfer ticket for passage on another line, if any, owned by the successful bidder hereunder, his heirs, successors or assigns, at all points of intersection or connection with such other routes, if such transfer be necessary to enable him to continue to his destination.”

This requirement seems to us to be one which the council had a right to make, and, if it be true that a company already operating a road with lines intersecting those of the proposed new line would be at a disadvantage in bidding, which may be matter of considerable doubt, still we see no reason why the requirement was not perfectly reasonable. It might well be supposed by the council that whoever should be the successful bidder would be likely in the near future to construct other lines in the city, and but for this provision an additional fare might be then required. If such a provision were not required, a company already operating in any city would have greatly the advantage over any other bidder. It was for the council to say what would be required of the successful bidder. It was its duty to make such provisions as in its judgment would conduce most to the good of the public. It exercised that judgment. There is no suggestion that it was not done in good faith, nor are we convinced that there was even a mistake in such judgment. We would not allow an injunction on account of this provision.

Unless, however, the plaintiff is estopped from maintaining his action by some act of the city, we would enjoin for the failure to give the notice required by the second section of the establishing ordinance. We are in accord with much that was said in the lower court on this question. In addition to what is there said, we call attention to the case of *Dixon Co. v. Field*, 111 U. S., 83, in which case it is said in the syllabus:

“A recital in a municipal bond of facts which the corporate officers had authority by law to determine and to certify estops the corporation from denying those facts; but a recital there of facts which the corporate officers had no authority to deter-

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mine, or a recital of matters of law does not estop the corporation.”

In this case it is held that when the proper tribunal has made a finding as to the facts necessary to authorize the issue of bonds by a county and has certified to the existence of such facts, the county, as against an innocent purchaser of the bonds, is estopped to deny that the facts are as found and certified.

In the opinion delivered by Judge Spear in *Ensel v. Levy & Bro.*, 46 O. S., 259, he quotes with approval this language from the opinion in *Beardsley v. Foote*, 14 O. S., 416:

“We think an estoppel may arise from admissions and declarations made without any fraudulent purpose. The circumstances may be such, that ‘good conscience and honest dealing’ may require a party to bear the consequences of his own negligent mistake, instead of throwing the resulting loss upon another whom he has misled.”

In this case Foote had purchased land upon which Beardsley had a lien. Before doing so he applied to the latter—whom he found attending an agricultural fair—for the purpose of ascertaining whether he held any claim or lien upon the land, informing him that he (Foote) expected to purchase if he could get a good title. Beardsley, in reply, gave a positive assurance that he had none, and Foote, relying on this assurance, purchased and paid for the land. An examination of the county records would have disclosed the lien. Beardsley was held estopped to set up his lien as against Foote’s title. The syllabus reads:

“Admissions *in pais*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterwards gainsaying them.”

On page 260, Judge Spear says:

“From the foregoing, it is fair to assume, that where one, by his acts or declarations, made deliberately and with knowledge, induces another to believe certain facts to exist, and that other rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled.”

The syllabus reads:

“An estoppel *in pais* arises where one is prejudiced by the willful act or declaration of another upon whose conduct the former has rightfully acted. Hence, where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form, and given under such circumstances as to cause an innocent purchaser, buying from the vendee, rightfully to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract and the vendor is estopped to afterwards set up a lien for purchase-money and insist upon its payment as a further condition to delivery of the goods.”

In the case of *The City of Mt. Vernon et al v. The State of Ohio, ex rel Berry*, the first clause of the syllabus reads:

“Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional and the subject-matter of the contract is not *ultra vires*, illegal or *malum prohibitum*, and the facts are such, as against the corporation, as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped.”

From these cases and others we conclude that municipal corporations may be estopped by their own acts, as well as natural persons, under certain states of fact. They may not do those things which are *ultra vires* and thereby be estopped from denying the validity of the things so done, but they may be estopped from denying the existence of facts which, by the action of their proper officers they have declared to exist, which facts are necessary to authorize them to do some other thing when they have thereby misled another to his prejudice.

In the case under consideration the council was authorized by law to grant a franchise for the construction and operation of a street railroad on Dennison avenue, provided it pursued the mode pointed out by law for that purpose. The granting of the franchise was not *ultra vires*. By its own ordinance it provided in effect that such franchise would not be granted until notice for bids had been published for three consecutive

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weeks. Having so provided, it was as much bound to make the advertisement as though the statute of the state had in terms required it. Before the franchise could be lawfully granted, it was necessary that such publication be made. It was the duty of the city to ascertain whether this publication had been made. Clearly, this duty of the city was to be performed by its council. That body must know, before it grants the franchise, that the publication has been made. By its ordinance granting the franchise it declared in these words:

“Whereas, Peter Witt, City Clerk of said city, in pursuance of the direction in said ordinance contained, did give public notice, by due publication thereof, in accordance with law, in two newspapers of opposite politics, and in a German newspaper, all of general circulation in said city, for three consecutive weeks next preceding the 18th day of July, 1903, advising the public that sealed proposals would be received not later than 12 o'clock noon of the 18th day of July, 1903, at office of the city clerk in the City Hall, for the grant of the right to construct and operate, for a period of twenty years, said street railroad, over said streets in said ordinance and advertisement described.”

Here, then, was the statement solemnly made by the proper authority, to the grantee of the franchise, and to the public, that this prerequisite had been complied with. It was the duty of the council to have knowledge on the subject. It declared by this ordinance that it had such knowledge, and that the publication had been made. The grantee had a right to rely on this declaration, he being without knowledge on the subject. No search of the records of the council could have furnished him any information that the statement was not true. The Forest City Railway Company, which is the owner of all the rights which the grantee took, acted upon this information and in good faith expended something like \$30,000 in execution of the work undertaken under the grant by the grantee. This sum, or the greater part of it, will be lost to the company if the injunction is allowed. Nothing is shown that will be lost to the city if it is denied. The proper authorities of the city have declared that the public will be benefited by the construc-

tion and operation of a street railway along the proposed route. No one has bid for it but the grantee of this franchise. No other bidder is suggested as probable except a corporation which notified the city in writing that it would not bid. We come, therefore, to the conclusion that the petition should be dismissed, and judgment is rendered accordingly.

Wilcox, Collister, Hadden & Parks, for plaintiffs.

City Counsel, Blandin, Rice & Ginn, for defendants.

SIDEWALK IMPROVEMENTS UNDER THE MUNICIPAL CODE.

[Circuit Court of Wood County.]

ARSULA WESTENHAVER v. THE VILLAGE OF HOYTSTVILLE.

Decided, November 25, 1905.

Sidewalks—Alternative Procedure for the Construction of—Special Ordinance not Necessary—Presumption as to Benefits—Burden of Establishing Irregularities in Procedure—Discretion of Municipality as to Ordering Improvement—Injunction—Provision for Assessment of Costs.

1. In the construction of sidewalks, municipalities are not confined to the mode of procedure provided under Section 50 *et seq.* of the municipal code, but they may proceed in the summary manner provided in Section 70 *et seq.*
2. A special ordinance for the construction of a specific sidewalk is not required, where a general ordinance for the construction of sidewalks has been theretofore enacted.
3. There is no requirement that council shall ascertain in any way that land upon which it is proposed to impose a sidewalk assessment has been benefited by the improvement, but the mere fact that the land abuts on the improvement may be taken as evidence of benefit.
4. In an action to enjoin the collection of a sidewalk assessment on the ground of irregularities of procedure, the burden is upon the plaintiff to point out and establish irregularities warranting the setting aside of the assessment.

WILDMAN, J. (orally); PARKER, J., and HAYNES, J., concur.

The claims of the plaintiff in this case, which is an appeal from the Court of Common Pleas of Wood County, are stated

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in the amended petition. Many of the facts in the case are not disputed. The village of Hoytsville is a municipal corporation in this county, and it appears by the pleadings, evidence and concessions that a sidewalk has been constructed along the east side of property, owned at the institution of this suit by the plaintiff, and that she has been assessed for its cost. Believing the assessment to be invalid, she declined to pay it, whereupon a penalty was imposed, and upon its being certified to the auditor she instituted this suit to enjoin the collection of the assessment and penalty, amounting to \$204.12. The case involves a question of so much importance, as affecting improvements of this character in other municipalities over the state, that it would be interesting and perhaps profitable to consider in some detail the authorities which have been cited in argument. The case may, however, be very briefly disposed of by an announcement of the construction which we have placed upon the statute under which the improvement was made.

In the year 1902, in an extraordinary session of the Legislature, a new municipal code was adopted, and among other matters therein treated provision was made for improvements of this kind. In 96 O. L., 39, we have Section 50 (Revised Statutes, 1536-210) and other sections provided for the improvements of streets, alleys and public roads in various ways, including among such improvements the construction of sidewalks. The petition herein is based upon the theory that this sidewalk could properly be constructed and the costs thereof provided for, so far as the assessing of property owners was concerned, in no other manner than by application of the provisions of Section 50 and those immediately succeeding. The same statute, however, on page 45, contains Section 70 (Revised Statutes, 1536-232), a part of which I will read—

“The council of cities and villages may provide by ordinance for the construction and repair of all necessary sidewalks, or parts thereof, within the limits of the corporation.”

And then follow provisions as to the manner in which the construction of a sidewalk may be provided for; an opportunity given the owner of abutting lots or property to construct for

themselves, and in default thereof, providing for the construction by the municipality, and the imposing of the costs upon the abutting property owners.

After as critical examination as we have been able to give to these various sections, we are of the view that an alternative procedure was given to municipalities for the construction of sidewalks; that they were not held to the somewhat costly and slow process provided for general improvements under Section 50 *et seq.*, but that they might proceed in the summary manner provided by Section 70 and sections immediately following it.

We are of the opinion also that the proceedings so required have been in this case substantially carried out. It appears that before the adoption of this new code a general ordinance for the construction of sidewalks had been enacted. No special ordinance was passed for the construction of this particular sidewalk, and our judgment is that one was not required.

It is asserted in this petition that no opportunity was given to the owner to build the sidewalk, because it was not pointed out to her what should be the grade upon which the sidewalk should be established; that no specifications were furnished her and no opportunity given her to determine just how the sidewalk should be constructed. Our judgment is, that if she complied with the notice given to her and in accordance with all the light given her by the resolution ordering the improvement, the city could not complain if it were in default in any way in not providing her with specifications for the improvement.

This sidewalk was constructed of brick, five feet wide, not along her entire frontage, but along part of it; but even if the entire cost of construction of the walk along her entire frontage had been placed upon her property we see nothing in this statute which would inhibit such action of the municipality. The statute in this alternative procedure makes no condition that the lands or lots abutting upon the improvement shall be benefited thereby. It seems to be the contemplation of the Legislature that the mere fact that the lots or lands abut upon the sidewalk shall be sufficient evidence of benefit to justify the imposition of the cost upon the property. At any rate, there is

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no requirement in this part of the statute that the council shall ascertain in any way that the land is benefited, but the statute is express that the council may assess the costs of the improvement upon the abutting lot or lots or lands.

It may be that a court of equity, if there was an oppressive use of the power given to the municipality, might by injunction stop the exercise of such power. It may be that a court might have jurisdiction to prohibit a gross abuse of that discretion which is lodged in the legislative power of the municipality. But nothing of that kind appears here. It is urged that this sidewalk was constructed in front of property known as farm land, and that the sidewalk was constructed in such a way that it was of no special benefit to the land along which it lay by reason of its being so constructed that the water would not flow away from it; but it appears that the council assessed not much more than one-half of the cost of the sidewalk upon this abutting land. The land abutted on a street running north and south, and a large part of the walk, nearly but probably not quite half, in front of the plaintiff's property, was constructed on the opposite side of the street; these two walks were connected by a crossing, so that a person could have a continuous sidewalk by using both sides of the street. There is not expressed in this part of the statute any limitation as to the percentage of the assessed valuation of plaintiff's property which may be charged with the cost of this kind of an improvement. But even if the limitation in earlier sections applies, and even if she could be charged with only thirty-three and a third per cent. of the entire valuation of her property for taxation, still there can be no complaint in this case. The amended petition alleges the value of the property as assessed for taxation at twelve hundred and ninety dollars; the amount of the costs here assessed was only \$182.32, or with penalty added \$204.12, considerable less than thirty-three and a third per cent. of the value of the land as appraised for general tax purposes.

The statute subsequently passed in 1904, amendatory of many of these sections, does not greatly aid the present inquiry. The sidewalk under consideration was constructed in 1903 and while

the statute of 1902 was in force as originally passed. There are some provisions in the statute of 1904 which may, however, throw some light upon the construction placed on that of 1902 by the Legislature passing the later act; but we think that so far as this question is concerned it does not disturb the view which we have taken. On the contrary, it rather reinforces and strengthens our conviction as to the proper construction to be given to the municipal code of 1902 (96 O. L., 20).

Under the new act, in Section 73 as amended by 97 O. L., 124 (Revised Statutes, 1536-235), it is provided that "no other or further proceedings for the construction or repair of sidewalks, curbing or gutters, and levying assessments therefor shall be necessary by the department of public service, or council, than the proceedings required under this and the two preceding sections"—which would be Sections 71 and 72 (Revised Statutes, 1536-233; 1536-234). Our judgment is that this was inserted in the amending section rather for the purpose of relieving any doubts as to the construction of the original Section 73, than for the purpose of changing or modifying the law in respect to which attention has been called.

In the code of 1902, Section 71 provides for a notice to the owners of the abutting property; Section 72 provides for the notice to non-residents or persons not found, and then Section 73 provides that on failure of the owner to construct a walk, the same may be done at his expense, without any qualification as to the benefit it may be, and without any qualification as to the amount that may be assessed. The provision is that the cost of the walk may be assessed. Whether the limitation as to amount of assessment found in other sections applies, we do not find it necessary to decide. In the latter part of Section 73 it is provided that the "expense shall be assessed on all property bounding or abutting thereon, and shall be collected in the same manner, with a penalty of five per centum and interest after failure to pay at the time fixed by assessing ordinance as in other cases of improvement."

Now, as to general improvements provided for by Sections 50, 51, 52 and 53, etc., there was a provision for the manner in

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which the costs of the same should be paid. Section 51 treated of the method in which the assessment could be paid and of the issue of bonds in anticipation of such payment, and provided that "the county auditor should annually place upon the tax duplicate the penalty and interest."

Now, the very fact that in this provision as to the cost of a sidewalk constructed under a resolution, where the whole cost is placed upon the property, no provision is made that that cost shall be assessed in the same manner as other costs, leads to the inference that the understanding of the Legislature was that this enactment was a proceeding independent of the other; otherwise it would not have been necessary to make this provision as to the certifying and collecting of the assessment for the costs of improving a sidewalk under Sections 71, 72 and 73.

Our view of the whole matter is that the plaintiff, upon whom the burden rested to show irregularities and defects in the proceedings for the construction of this sidewalk and the imposition of the costs, has not sustained that burden by the evidence; that the theory which has been the basis of this action, is not tenable; that the council did not proceed under Section 50 and those immediately succeeding, but under the other sections to which reference has been made. We do not adopt the contention that it is incumbent here for the defense to show all their procedure for the construction of this sidewalk and the assessing of these costs; the burden, in our judgment, does not rest upon the municipality, but that whatever defects are claimed by the plaintiff should be pointed out and proven to the court under the denials made in the answer of the defendant.

Our conclusion is that the injunction asked for should be refused, that the petition of the plaintiff should be dismissed, and judgment rendered against the plaintiff for the costs.

Taylor & Jones, for plaintiff.

Baldwin & Harrington, for defendant.

CONSTRUCTION OF THE NEGOTIABLE INSTRUMENTS ACT.

[Circuit Court of Clark County.]

HARRY L. ROCKFIELD ET AL V. THE FIRST NATIONAL BANK OF
SPRINGFIELD, OHIO.

Decided, May, 1906.

*Promissory Notes—Maker—Surety—Endorser—Notice to Endorser—
Negotiable Instruments Act of April 17, 1902.*

One who places his name on the back of a promissory note before delivery is a maker or surety, and is not entitled to notice of presentment and non-payment. The act of April 17, 1902, known as "The Negotiable Instrument Act," does not change the liability of such party as established by the Supreme Court of the state for many years.

DUSTIN, J. (orally) ; WILSON, J., and SULLIVAN, J., concur.

The First National Bank, as payee, brought two actions in the common pleas court against Rockfield et al upon two promissory notes of the defendant railway, on both of which notes the names of defendants, Rockfield and Snyder, appeared on the back as indorsers. Several other indorsers were also upon the notes, which were payable at the bank. The petition in each case is in the usual form, and does not aver that these indorsers were notified of any dishonor of the paper by the maker.

The indorsers above named demurred to the petition, and the demurrer was overruled. They then answered, and plaintiff below demurred to the answers, which set up that the defendants named were accommodation signers, and that they had not been notified of the dishonor of the paper.

The demurrers to these answers raised the same questions as the demurrers to the petitions. The demurrers were sustained, and Rockfield and Snyder prosecuted error to this court upon the judgments rendered, alleging that the court erred, first, in overruling the demurrers to the petitions, and second, in sustaining the demurrers to the answers.

Highly important and startling questions are thus raised as to the effect of the statute which was passed April 17, 1902, codify-

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ing the law of negotiable instruments in Ohio. It is conceded that up to that time the law was, as announced by several decisions of the Supreme Court, that a stranger to an instrument, who had signed before delivery of the instrument, his name being upon the back thereof, was, in the absence of any explanation, maker and surety; but it is now contended that he is an indorser, entitled to notice of presentment and non-payment, and, in the absence of notice, that he is discharged. This theory of the case presents several ingenious and interesting points, and an examination of the question has been quite entertaining to the court.

We think that the sections which should be considered in determining this question are, first, Section 3173-1, the sub-head being "Liability of Irregular Indorser." This section reads as follows:

"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties.

"2. If the instrument is payable to the order of the maker, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Therefore, his liability, as here defined, is the same as the maker and surety. It is in exact accord with the holdings of the Supreme Court in 55 O. S., p. 596, and previous decisions.

Section 3173*k* describes the liability of a general indorser, and that is the sub-head to this section, which reads:

"Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

"1. The matters and things mentioned in paragraphs numbered one, two and three of the preceding section;" and right here I will read paragraphs one, two and three of the preceding section, which is "j," and which defines the warranty where negotiation is by delivery:

"1. That the instrument is genuine and in all respects what it purports to be.

“2. That he has a good title to it.

“3. That all prior parties had capacity to contract.”

That implies, of course, that he is an indorser in the regular course, and that it was transferred by the payee or some subsequent indorser. That would be just as the law was before in the case of a party who indorsed after the first delivery.

“And, in addition, he engages that on due presentment, it shall be accepted or paid or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.”

This describes what was previously known as the liability of a general indorser, in the course of trade. Now, let us look at the subdivision on dishonor of paper. Section 3174*g*, reads:

“[*To Whom Notice of Dishonor Must be Given.*] Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.”

It is true that the words there are general; *any* indorser or drawer shall be given notice. We think that must be read in the light of previous definitions of regular and irregular indorser, and to make the statutes consistent, it can only apply to a general indorser. It will be observed that in Section 3173*i*, the party is not described as an endorser:

“Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:” * * *

In Section 3173*k*, every indorser, etc., is described as such. In Section 3173*i*, the party described has the *liability* of an indorser to a certain extent; in the first, he is *called* an indorser.

Now, Section 3173*h*, has also been commented upon. “When Person Deemed Indorser” is the sub-head:

“A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser,

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unless he clearly indicates by appropriate words his intention to be bound in some other capacity.”

We think that it is not inconsistent with the other section; but if it were, the statute describing the irregular indorser—and Rockfield and Snyder meet the description in this case—should control, upon the familiar principle that if there is any conflict between a general and a special statute, the special statute governs.

We are unable to see this in any other light than that Rockfield and Snyder come under the description of irregular indorsers in Section 3173i, and their liabilities are the same—as before stated, by decisions of the Supreme Court—as makers and sureties.

Some point was made of the fact that the title of the act reads: “To establish a law uniform with the laws of other states on negotiable instruments,” and it is argued that that indicates in itself the intention to change the law on that subject; otherwise there would be no necessity for the act; and the implication is that the laws of Ohio are different from those of other states, and this act is made to conform to them, thereby showing the legislative intent to change the law on this subject.

That argument would be quite forcible if it only applied to the subject of indorsement. Then perhaps there would be an indication that the Legislature intended to change the law in Ohio on the subject of the liability of an indorser. But, in fact, it includes the whole field of the law of commercial paper; and while it does imply an intention to change the law in some respects and make it conform with that of other states, there is no indication where the change is to appear. There are pages and pages concerning commercial power in all its phases; and we get no light from the title as to what is to be changed.

We think that the court did not err either in overruling the demurrers to the petitions, or in sustaining the demurrers to the answers, and that the law has not been changed by the statute referred to, and the judgment will, therefore, be affirmed.

Jas. Johnson, Jr., for plaintiff in error.

Martin & Martin, Hagan & Hagan, for defendant in error.

**EXEMPTION RIGHTS OF WIDOW WHO HAS SEPARATED
FROM HER HUSBAND.**

[Circuit Court of Muskingum County.]

IN THE MATTER OF THE ESTATE OF DIVVER McMILLAN, DECEASED.

Decided, June, 1906.

*Husband and Wife—Widow's Exemption—Year's Support—Section 6038
Construed.*

The fact that a husband and wife separate, and live apart for a number of years, does not destroy the wife's right of exemption as a widow; but until they are divorced, the wife at his death is entitled to a year's support and the articles of personal property mentioned in the statute.

McCARTY, J.; DONAHUE, J., and TAGGART, J., concur.

This matter comes before us on appeal from the common pleas and probate courts.

The statute authorizes certain property to be held exempt by a widow in her own name. This the appraisers of the estate of Divver McMillan failed to do in the first instance, and being called together again and instructed as to their duties, they went out to make a different appraisement; hence the question arises as to the rights of the widow and the rights of the executors under the will. A demurrer has been interposed to the answer of the executors by Mary A. McMillan, by Eli Border, her guardian, which answer reads as follows:

“Now come the executors of the last will and testament of the said Divver McMillan, deceased, and for answer to the application of Mary A. McMillan, by Eli Border, her guardian, to recall the appraisers, etc., of said estate and make allowances under the provisions of Sections 6038, 6039, 6040 and 6041 of the Revised Statutes of Ohio, say:

“That the said Mary A. McMillan on the 14th day of October, 1897, without cause deserted her husband and lived apart and separate from her husband during the remainder of his lifetime, to-wit, seven years; that said separation was a voluntary act of the said Mary A. McMillan, and was misconduct on her part, and the family relationship of husband and wife did not exist at the time of the death of the said Divver McMillan, and had not from said 14th day of October, 1897, and that the right of

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the widow to said year's allowance does not exist, for the reason that the family relation as above stated did not exist at the time of the death of the said Divver McMillan, and for the further reason that an agreement was made between the said Divver McMillan and the children of the said Mary A. McMillan, on the 23d day of October, 1897, whereby it was agreed that the said Divver McMillan should be relieved of any claim on account of support of said Mary A. McMillan so long as she might remain away from his home. Wherefore, these executors pray that the inventory filed by said appraisers be approved and that the application for recalling the appraisers, etc., be overruled and for such other relief as is proper."

To this answer a demurrer was interposed which raised the question as to whether the answer sets forth facts sufficient to constitute a defense on the part of the appraisers for not setting apart a year's support.

This brings us to another question, viz., is the widow entitled, in her own right, to certain things without administration; has she a right to a year's support and certain articles of personal property? The question was fully argued, heard, and disposed of in the probate court, and a petition in error was filed in the common pleas court, which court sustained the demurrer.

Section 6038 of the Revised Statutes is in this language:

"When any person shall die leaving a widow or minor child or children under the age of fifteen years, the following property shall not be deemed assets or administered as such, but shall be included and stated in the inventory of the estate and signed by the appraisers without appraising the same—

"First. One family sewing machine, to be retained by said widow absolutely as her own property, and all spinning wheels, weaving looms, and stoves set up and kept in use by the family.

"Second. The family Bible, family pictures, and school books used by or in the family of the deceased, and books, not exceeding one hundred dollars in value, which were kept and used as part of the family library before the decease of such person.

"Third. One cow, or if there be no cow, household goods, to be selected by the widow, or if there be no widow, by the guardian or next friend of such minor child or children, not exceeding \$40 in value, or if there be no household goods such as the widow or guardian or next friend may desire to select, then \$40 in money: all sheep to the number of twelve, their valuation not to be greater than \$75, and the wool shorn from them, and the yarn

and cloth manufactured by the family; all flax in possession of the family intended for the use thereof, and yarn or thread cloth manufactured therefrom.

“Fourth. All the wearing apparel and ornaments of the family and of the deceased, all the beds, bedsteads, and bedding, cooking utensils, and tableware necessary for the use of the family, one clock, one side saddle, and any other articles of personal property not to exceed \$100 in value, which the widow, or if there be no widow, the guardian or next friend of such minor child or children, may select, to be valued by the appraisers.”

It is said here in argument that there was some controversy between husband and wife, and it was perhaps mutually agreed by them that they would live apart and not cohabit together as husband and wife any further, which they continued to do for about the period of seven years. It is contended that relations between them as parts of the same family ceased to exist, and it is also said that the wife at one time brought an action for divorce, there was an answer to this petition praying for divorce, but there was never any divorce granted. Therefore, when this husband died, he left this woman as his widow, there being no legal separation, and as his widow she would be entitled to a year's support and the articles of personal property as I have stated.

In the note under Section 6038 is the following:

“The allowance to the widow for her support for the year is such a debt against the estate of her husband that resort may be had for the payment of the same against land conveyed away by the deceased for the purpose of defrauding his creditors.”

There are several decisions along this line, holding, in effect, that until a wife and a husband are divorced, the wife is, at the husband's death, entitled to a year's support and the articles of personal property mentioned in the statute.

We have, therefore, concluded that the answer set up by the executors does not constitute a defense to the cause of action stated in the application of Mary A. McMillan, and we shall affirm the decision of the common pleas court, and we sustain the demurrer to said answer.

McHenry & Ribble, for plaintiff in error.

Winn & Bassett, for defendant in error.

EVIDENCE AS TO VALUE IN APPROPRIATION PROCEEDINGS.

[Circuit Court of Cuyahoga County.]

THE CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY V.
THOMAS M. GORSUCH ET AL.

Decided, December 22, 1905.

Eminent Domain—Evidence—Tests of Value of Land Taken—Character of Adjacent Railway Line—Recent Sales—Price Paid by Owner—Value at a Prior Date—General Selling Price in Neighborhood—Separate Valuations on Land and Building.

1. In an action to fix compensation for land appropriated for railroad purposes, testimony to the effect that the company using the freight house adjoining the premises operates one of the largest systems in the country is proper, because of the greater value of property thus located over that on an insignificant line.
2. The proper test of the value of land so appropriated is not the price paid at a particular sale, but the general selling price in the neighborhood.
3. The amount paid by the owner of the property sought to be appropriated does not fix its present value, nor is its present value shown by evidence as to its value at a date fourteen months earlier, but both have a bearing on its present value, and are admissible in evidence as tending to show present value.
4. A property owner has the right to show the value of his land separate from the building, and the value of the building separate from the land, and in the absence of all other evidence the aggregate of these two valuations should be taken as the value of the parcel.
5. A motion to take from the jury an entire answer as unresponsive is properly overruled, where a part of the answer is directly responsive and the remainder is not prejudicial.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

The railroad company brought proceedings in the probate court of this county to appropriate for railroad purposes certain real estate owned by the defendant Gorsuch and others in the city of Cleveland. By proper proceedings the matter of the assessment of the compensation to be paid for the premises so appropriated was brought to trial in said court, and the jury made return by its verdict of the amount assessed

in favor of each owner whose lands were sought to be appropriated. Judgment was entered for each on such verdict. The plaintiff brought proceedings in error in the court of common pleas to reverse the judgment as to Gorsuch. On hearing, such judgment was affirmed, and these proceedings are now prosecuted here to reverse such judgment of affirmance.

A bill of exceptions is filed here containing all the evidence offered on the trial in the probate court, together with a record of all the proceedings at such trial. Numerous rulings of the court are complained of, all of which have been carefully considered, and some of which are especially pointed out in this opinion. Mr. Gorsuch, the owner of the premises, was undergoing examination as a witness and had testified as to the surroundings of the property, the increase of business in the neighborhood, the proximity of the Valley Railroad tracks, etc., and then this question was asked:

“What, Mr. Gorsuch, is the common reputation of the C., T. & V. Ry., whether or not it is being operated as a part of another system. A. To the best of my judgment and what I have seen, by the Baltimore & Ohio.”

On motion of the defendant the answer was taken from the jury, and then this question was asked:

“Mr. Gorsuch, you may state whether there is a common reputation in the neighborhood in which you live, that the Cleveland Terminal & Valley Railroad Company are operating and using this freight station which is in the rear of your property, whether they are or not?”

This was objected to by the plaintiff, the objection overruled, and plaintiff excepted.

“A. It has been used in that way.”

Then this question:

“Well, now, what railway company has been using and operating this freight station in the rear of your property?”

This was objected to, the objection overruled, and an exception taken.

“A. Well, it has been operated by the Baltimore & Ohio.

“Q. Now, Mr. Gorsuch, have you any personal knowledge

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of the character, as to the extent of the Baltimore & Ohio Railroad Company, whether it is a large or a small railroad?

“(Objected to; objection overruled; exception).”

“A. It is one of the largest systems we have got, amongst the largest.”

We find no error to the prejudice of plaintiff in any of these rulings. The witness does not testify as to the reputation in the neighborhood as to either railroad company. He does testify that the freight house adjacent to his premises was used by the Baltimore & Ohio, and that this is one of the largest systems in the country. We think it entirely proper in an effort to ascertain the value of property to show that it is near to a great railroad. Property is likely to be enhanced in value by being near to such a railroad over what it would be by some insignificant tramway or small road.

Mr. A. G. Daykin, a witness on behalf of defendant Gorsuch, was being cross-examined by counsel for the plaintiff, and this question was asked of him:

“Did you know, Mr. Daykin, of Mr. Gorsuch having within about a year sold the thirty-three feet adjoining? A. No, I don't know anything about it, except what Mr. Gorsuch said about it.”

“Q. Did you learn, prior to testifying, that such a sale had been made of 33½ feet adjoining by him at about the time he acquired this property? A. I don't think I did, Mr. Tolles. He said something about being skinned out of a piece there, but I didn't take it into consideration.”

The plaintiff moved to have this entire answer taken from the jury, and same was overruled.

There was no error in this ruling. Certainly the first sentence of the answer is directly responsive to the question put. The court was not asked to take a part of the answer from the jury, but to take it all away. Nor do we regard the last part of the answer as prejudicial to the plaintiff. There is nothing to indicate who Gorsuch thought skinned him, if anybody did.

Further on in this cross-examination the same witness was asked if he did not know of the sale of certain other property by the plaintiff in this locality, and he answered:

“Yes; he told me he got swindled out of it.”

Motion was made by plaintiff to take this answer from the jury. The first part was responsive to the question; the last part was not prejudicial.

Without stopping to call attention to each of the rulings on the admission of evidence, in which we find no error to the plaintiff's prejudice, we come to the consideration of a question appearing on page 136 of the record. Mr. F. H. Goff was upon the stand as a witness for the plaintiff. He had qualified as being sufficiently acquainted with the value of lands in the neighborhood of those under consideration to entitle him to give an opinion as to such values, and had placed a value upon the defendant's land, the value of which was in issue. He was then asked this question:

"You may state, Mr. Goff, what, during the period named by you in your previous examination, has been the general selling price of lots upon James street?"

This was objected to, the objection sustained and exception taken. It was expected that the witness would answer \$1.50 per square foot without buildings; \$2.50 with buildings. This was property in the immediate vicinity of that in question. Mr. Goff had testified that he knew of a considerable number of sales in that vicinity within the past two years. He had given his estimate of the value of this property. The question now under consideration sought to bring out an independent fact, viz., the general selling price of lands in the neighborhood within a comparatively short time. He had already said that he knew what it was. We think if the witness had testified that he had not examined the tract in controversy, it would still have been competent to show by him at what prices land in that locality was selling for.

Lewis on Eminent Domain, paragraph 443, says:

"The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is almost universally approved by the authorities."

He shows, however, that there are high authorities to the contrary.

Elliott on Railroads, Section 1036, says that it is not settled that the price paid on particular sales is admissible, but that it

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is the general selling price of land in the neighborhood which is the test. We hold that the evidence of the general selling price of land in the neighborhood is admissible, not the price paid at a particular sale, and that, therefore, there was error in excluding such testimony.

It appears from page 27 of the bill of exceptions, that when Mr. Gorsuch, the defendant, was upon the stand in his own behalf and had testified that the market value of the property in question was \$15,000, he was on cross-examination asked by plaintiff's attorney, from whom he purchased it. He answered, from Mr. Johnson, and that it was two months more than a year before he testified. He was then asked if the price he paid was not \$7,000, and, again, what the price was that he paid, stating that he expected the witness to answer, if permitted, that he paid \$7,000. Both these questions as to the price paid were, on objection of defendant's counsel, excluded. In this we think there was error. The price paid does not fix the value, nor does the value fourteen months prior to the time at which value is now to be determined, even when fixed, determine the present value, but both have a bearing on the present value and are admissible in evidence as tending to show present value. But the question here was asked on cross-examination and might well have been admitted as testing the witness. See *Hoffman v. Conner*, 76 N. Y., 121.

On page 195 of the bill it appears that J. G. W. Cowles was being examined as a witness for the plaintiff. He qualified as to the value of the land, but not as to the building, and he was asked to give the fair market value of the land exclusive of the building. This, on objection of defendant, was excluded. Plaintiff expected him to say \$2 per square foot. These and other like questions were asked of witnesses produced by the plaintiff for the purpose of showing the value of the building and the land separately. The court excluded such evidence.

The defendant contends that there was no error in those rulings, because the statute requires the jury to fix a value on the *parcel* to be appropriated, and here the land and the building together constitute the *parcel*. It is true that there is but one parcel to be paid for, but if this parcel is made up of parts,

though the aggregate value of the several parts taken separately may not be the value of the parcel taken as a whole, yet such value of the parts furnish some criterion upon which to form a judgment of the value of the parcel. Of course, there are some things where it may well be said that the value of the parts taken separately can form no such criterion. A complicated machine may be of great value as a whole, and yet the several parts, when separated, be of practically no value whatever. But the case of a building upon land is far removed from this. Suppose the value of a farm of one hundred acres on which is a fine house is to be ascertained. Can it be doubted that those farmers owning, buying and selling land in the immediate vicinity, but who know nothing of the expense of putting up such a house, may be permitted to testify as to the value of the *land*, exclusive of the house, and that a competent builder may testify as to the value of the *house* for the purpose of ascertaining the value of the farm as a whole? It is not certain that the farm is worth as much as the combined value of the land and house, for the house may be wholly unsuited to the purpose of the farm, and yet in itself be of great value. It may be, too, that the value of the house alone and of the land alone may be *less* than the value of the farm with the house upon it, because of the fact that the two are so admirably adapted to each other, but it would hardly be urged that a separate valuation of the land and the house might not aid in coming to a right valuation of the whole. One can readily conceive of a case where of necessity the value of the thing to be paid for must be ascertained by taking the separate value of the several parts of that thing. A railroad company by one wrongful act destroys one's turnout, consisting of horse, harness and carriage. One witness or a dozen witnesses know the value of the horse, but no one of them knows the value of the carriage. Another witness or another dozen of witnesses know the value of the carriage, but no one of them knows anything of the value of the horse. No one would doubt that in such case the value of each might be shown separately.

In the case at bar we are of the opinion that the plaintiff had the right to show the value of the land separate from the building, and the value of the building separate from the land, and in

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the absence of all other evidence the aggregate of these two valuations should be taken as the value of the parcel.

For the errors pointed out in this opinion the judgment of the court of common pleas is reversed, as is also the judgment of the probate court, and the case is remanded to the court of common pleas for further proceedings.

Kline, Tolles & Goff, for plaintiff in error.

Goulder, Holding & Masten and Smith, Taft & Arter, for defendants in error.

**QUESTIONS ON RE-EXAMINATION AS TO VALUE OF
LAND CONDEMNED.**

[Hamilton County Circuit Court.]

THE COVINGTON & CINCINNATI BRIDGE COMPANY v. GEORGE
A. MAGRUDER ET AL.

Decided, June 16, 1906.

Eminent Domain—Withdrawal of Award by Land Owner—Not Prejudicial to Second Hearing as to Value of Land Taken, When—Retention of Cause in Common Pleas—Upon Reversal of Judgment of Probate Court—Discretion—Error—Section 6438.

1. A company which has appropriated land and paid into court the amount of compensation fixed therefor, under a stipulation that the money can be withdrawn by the land owner without prejudice to any other rights, may be required in the discretion of the court to go into a second trial as to the value of the land without a refunder of the first award.
2. Under the rulings of the Supreme Court in this case (63 O. S., 455, and 69 O. S., 372), the trial court did not err in refusing to consider the errors assigned upon the first proceedings in error, and in failing and refusing to set aside the first judgment, and in failing and refusing to affirm the judgment of the probate court.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

Hearing on review of proceedings in condemnation.

We find no error in the action of the trial court in the second proceedings in requiring the plaintiff in error to pro-

ceed to a hearing and trial without requiring a refunder of the amount of the first award withdrawn from the depository of the court. This withdrawal had been made under a stipulation by the parties that it was to be without prejudice to any other rights. The Covington & Cincinnati Bridge Company had ceased to pay rent under the lease, and were in possession of the premises, practically as the absolute owner in fee simple, and said bridge company was satisfied to let the award made theretofore in the probate court stand and was endeavoring to preserve that award and prevent a re-examination in the court of common pleas of the question as to the amount of compensation to be paid to Magruder and others. It is true that there was an apparent inconsistency on the part of Magruder and others in holding on to this money, and at the same time insisting upon a re-examination of the question as to how much they were entitled to, and yet they stated that in the event of a smaller award they stood ready and were able to refund the difference.

We think that this was a matter largely addressed to the discretion of the court, and in all events was a matter which could be provided for in the court's judgment when the amount of the award had once been finally fixed. Further, even if there were any error in this regard, it turned out to be without prejudice, because the award of the jury was largely in excess of the amount so withdrawn from the depository, if the proceedings leading up to said award were without error.

If then we find no error in the second proceedings in submitting this question to the jury, there will be no error in requiring the plaintiff in error to proceed to a hearing without requiring such refunder.

The trial court did not err in refusing to consider the errors assigned upon the first proceedings in error, and in failing and refusing to set aside the first judgment, and in failing and refusing to affirm the judgment of the probate court. It is plain from the language of the opinions of the Supreme Court in the case of *The Covington & Cincinnati Bridge Co. v. Magruder*, 63 O. S., 455, and *The State, ex rel, v. The*

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Judges of the Court of Common Pleas of Hamilton County, Ohio, 69 O. S., 372, particularly at page 378, where the Supreme Court says that when it remanded the cause to the court of common pleas for trial as provided by law, it meant the provision of law contained in Section 6438, which provides that if the court of common pleas upon the hearing of the cause reverses such judgment, it shall retain the cause for trial and final judgment. We think that the trial court below followed the instructions of the Supreme Court and did right in this regard. The trial in other respects was routine and the questions as to value, stereotyped.

We find no error in the special charges or the charge of the court; neither was any error in this regard strenuously urged at the argument. The court did not err in overruling the motion for a new trial. Having disposed of all the questions antecedent to the trial to the jury below, we find no prejudicial error in the trial to the jury, and are therefore of the opinion that the judgment of the court of common pleas should be affirmed.

Maxwell & Ramsey, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, Harper & Allen and Richards & Richards, contra.

**INFORMALITY IN THE BORROWING OF MONEY BY A
BOARD OF EDUCATION.**

[Circuit Court of Fulton County.]

PETER BOWER ET AL V. THE BOARD OF EDUCATION OF FULTON
TOWNSHIP, FULTON COUNTY, OHIO, ET AL.

Decided, June, 1906.

*Constitutional Law—Section 2834b Void in Part—Liability of Board of
Education—For Money Borrowed without Form of Law—Injunction.*

1. Section 2834b, in so far as it applies to boards of education, is unconstitutional for lack of uniformity of operation; and failure on the part of a board of education to comply with the requirements

of this section in incurring an obligation does not render the obligation void.

2. But even if failure to comply with statutory requirements should render a note executed by a board of education unenforcible at law, the principles declared in 11 C. C., 41, require recognition by the board of the obligation incurred, and would prevent an injunction lying against its collection.

Per Curiam.

It being shown that on and before September 7, 1905, the Board of Education of Fulton Township had incurred valid and existing obligations under contracts with teachers, drivers for wagons to convey pupils, janitors, etc., for services for the school year 1905-1906 to the amount of \$3,696 and that on that day there was but \$437 in the treasury of said board to meet said obligations, but a legal levy of taxes had been made and was in process of collection sufficient to meet the same, but not so soon as they would mature, and that in anticipation of such collection and to meet said obligations as they should mature, said board on said day borrowed from the Bank of Swanton \$2,000 and gave to it the note of the board, payable in one year, with interest at six per cent. per annum; and that the board and the bank proceeded in good faith and under the belief that the transaction was lawful, and that all steps required by law to make it strictly legal had been taken, but that the board, before making said loan, did not, by a formal resolution, determine upon the existence or validity of any indebtedness or obligation of said board nor did the clerk of said board prior to the time said loan was made and said note given certify that the money required for the payment of said note was in the treasury to the credit of the fund from which it was to be drawn, or had been levied and placed on the duplicate and was in process of collection, and not appropriated; nor was any resolution adopted or certificate made in accordance of the provisions of Sections 2834a and 2834b, Revised Statutes, governing cases where such resolutions and certificates are required; and this action having been brought by certain tax-payers of the school district to enjoin the payment or collection of said note on the ground that it is null and void and no legal obligation has arisen thereunder because of non-compliance with said statutes—*Held:*

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1st. That Section 2834*b*, in so far as it applies to boards of education is unconstitutional, null and void, because it is a law of a general nature, but as to such boards it does not have a uniform operation throughout the state, certain city districts being excepted from its operation. Section 26, Article II, Constitution of Ohio; *Kelly v. State*, 6 O. S., 270; *State, ex rel, v. Bargas et al*, 53 O. S., 94; *State, ex rel, v. Buckley et al*, 60 O. S., 273; *Gaylord et al v. Hubbard*, 56 O. S., 25; *State, ex rel, v. Yates*, 66 O. S., 546.

Therefore, failure to comply with the requirements of Section 2834*b* does not render said obligation void.

2d. Whether Section 2834*a* is subject to the same infirmity we are not called on to decide, since all action that might be taken thereunder has been taken in this transaction, and nothing remains to be done thereunder that might be enjoined.

3d. Even if a failure to observe formalities or statutory requirements renders the note unenforceable at law, we are of the opinion that the principles declared in the case of *State, ex rel, v. Board of Education*, 11 C. C., 41 (affirmed by Sup. Ct., 53 O. S., 656), which we regard as sound and applicable here, forbid any hindrance to the collection being interposed by the court, and require the recognition by the board of the obligation incurred through borrowing and using the money, and require its repayment by the board. These principles seem to us to apply with especial force here, because of the last clause in Section 2834*b*, to the effect that the requirements before mentioned respecting resolutions and certificates shall not "apply to contracts authorized to be made by other provisions of law for the employment of teachers, officers and other school employes of boards of education," and the fact that this money was borrowed and presumably used to discharge obligations of the character named in said proviso.

Injunction refused. Petition as to that dismissed. Judgment against plaintiffs for costs on that issue. Motion for new trial overruled; exceptions noted. Statutory time allowed for filing bill of exceptions.

Tiler & Paxson and *Ham, Ham, & Ham*, for plaintiffs in error.
Handy & Wolf, for defendants in error.

NO INSURABLE INTEREST IN A BROTHER.

[Circuit Court of Cuyahoga County.]

FRANK NEWMORE v. THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY.

Decided, June 15, 1906.

Life Insurance—Wagering Contracts—Insurable Interest—Relationship of Brother not Sufficient to Support a Policy.

The word "stranger" as used in 50 O. S., 601, having reference to insurable interest, includes a brother; and a policy of insurance taken out on the life of a brother who is in good health, is younger than the assured, does not depend upon him, and has no knowledge of the issuance of the policy, is not saved from the inhibition as to wagering contracts by the allegation that the purpose in taking out the policy was to provide a fund for the burial of the insured in case of his death.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

In this case the court of common pleas sustained a general demurrer to the petition, and the plaintiff not desiring to plead further, judgment was entered that the petition be dismissed at the costs of the plaintiff. To this order and judgment error is prosecuted here, and we have then the question, whether the allegations of the petitions are such, all being true, as to entitle the plaintiff to any relief. The material allegations of the petition read as follows:

"For his first cause of action against defendant, plaintiff says that on or about the 11th day of October, 1904, at the city of Cleveland, in said state, one H. Stoner, then and there being a duly authorized and acting agent of defendant, solicited plaintiff's wife to take out a policy of insurance upon the life of Peter Newmore, a brother of plaintiff; that plaintiff's said wife then and there acting for and on behalf of plaintiff, and being authorized by plaintiff so to act in the premises, consented to take out a policy of insurance from defendant upon the life of said Peter Newmore, and then and there gave to said Stoner the street address at which the said Peter Newmore could be found; that at the same time and place said Stoner produced

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an application blank to plaintiff's wife and pretended to fill out the same, pursuant to questions propounded to and answered by plaintiff's said wife, but that said agent without the knowledge or consent of plaintiff or his said wife, erroneously named as beneficiary in said application one Kate Newmore, whose relationship is stated to be that of a daughter, and whose age is stated to be ten years, whereas the directions given by plaintiff's wife on said occasion, she then and there acting for and on behalf of plaintiff, and being duly authorized to act in the premises, were to name as beneficiary in said application the plaintiff herein, whose relationship was given as that of a brother and whose age was given as thirty-three years; that said Peter Newmore had no daughter nor was there existing any such person as Kate Newmore, aged ten years, as stated in said application.

"Plaintiff further says that said Stoner having procured the foregoing information as to the beneficiary, agreed to seek out said Peter Newmore and make a personal examination of him and procure from him the remaining information made necessary by said application; that on or about the 24th day of October, 1904, the defendant delivered to plaintiff its policy No. 1119071 upon the life of said Peter Newmore, the premium upon said policy being \$5.20 per year, payable weekly, the payment of such sum being the consideration upon which said policy was issued, and said sum having been paid by plaintiff regularly from and after the issuance of said policy, and such payment being made through his wife acting as his agent as hereinbefore stated.

"Plaintiff says that the errors appearing in said application were and are due to the mistake and fraudulent conduct of the company's said agent; that at the time said application was made, the said Peter Newmore was indigent and plaintiff desired, solely by reason of his relationship to him, to provide for his proper interment in the event of his death, and that plaintiff had an insurable interest in the life of said Peter Newmore.

"Plaintiff further says that question eleven of said application required an answer as to the fact of said Peter Newmore's being insured in the defendant company or in other companies, together with the names, amounts, and numbers of the policies in said companies; that the answer to said question eleven as it appears in said application, was that said Peter Newmore was not insured in the defendant company or in any other company or companies, whereas there was upon the date of said application an existing policy upon the life of said Peter Newmore in the sum of \$550, payable to the wife of the insured:

that neither plaintiff nor his said wife acting as his agent, had any knowledge whatever of the existence of said policy, and plaintiff avers that the said answer to question eleven in said application was, through the fault and negligence of said Stoner acting as agent for and on behalf of the said company, erroneously and incorrectly written in said application, and that defendant would have obtained the information required by the ninth paragraph of the condition of said policy were it not for the fault, neglect, and mistake of its own agent in procuring said policy; that if said agent had correctly written the answer to said question eleven, and had made proper inquiry and investigation as he undertook to do, plaintiff would have had the opportunity to procure upon said previous policy the endorsement required by said ninth paragraph of the conditions of said policy, and which plaintiff did not procure."

It then goes on to aver that the premiums were paid by the wife of the plaintiff acting as his agent, and that Peter Newmore, the insured, died, and the plaintiff seeks a reformation of the contract, and that he have judgment against the insurance company for the amount named in the policy.

It will be noticed that no allegation is made that the insured ever knew of the issuance of this policy. It was taken out by the plaintiff, on his own application, the premiums were all paid by him, and the benefits, if the policy had been written as the petition says it should have been, were all to come to him. The relationship between the insured and the beneficiary was that of brothers. There was no dependence in any way of one upon the other. The amount for which the policy was taken was small, being but for \$112, and it is alleged that the insured was indigent, and the plaintiff wished to provide funds in this way for the proper funeral expenses of the insured when he should die.

It is, however, further alleged that the insured already had a policy in this same company for \$550, payable to his wife. True, it is said that this was unknown to the plaintiff and to his wife, who acted as his agent in all matters relating to this policy, but surely a very little effort on the part of the plaintiff or his agent would have obtained this information for them, and they would have been relieved of any anxiety about the funeral expenses.

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There is nothing in the petition to indicate that the insured was likely to die before the plaintiff. He was but thirty-six years old and in good health when the policy was issued.

There was nothing, then, to relieve this from the obnoxious features spoken of in the books as "a wagering contract" except the relationship between the parties.

In *Ryan v. Rothmuiler et al*, 50 O. S., 601, Judge Burket quotes with approval the following language from May on Insurance:

"While a man may cause his own life to be insured for the benefit of a stranger, and the want of insurable interest in the stranger will not invalidate the policy, a policy taken out by a man for his own benefit on the life of a stranger would be void for want of insurable interest."

This proposition is thoroughly settled, but the question still remains whether, in the sense in which the word "stranger" is used in this proposition, it includes a brother as such.

In *Lewis v. Phoenix Mutual Life Insurance Co.*, 39 Conn., 100, it is said in the syllabus, "that the mere relationship between the plaintiff (the beneficiary) and L (the insured) was not such an interest as would support the policy." The relationship spoken of was that of brothers. In the same case, at page 104 of the opinion, it is said:

"We think it a correct legal proposition that the mere relationship of a brother is not such an interest as will support a policy of life insurance."

In *Bliss on Life Insurance* there is a very full discussion of what constitutes an insurable interest in the life of another, beginning with Section 20 and ending with Section 31. The heading of the last named section is "General Conclusions," and the following language is used:

"* * * with reference to the insurable interest arising or implied from relationship, the correct view would seem to be that an insurable interest will be held to exist where the relationship is such that the assured has a legal claim upon the insured for services, or for support, or where, though such legal claim does not exist, yet from the past personal relations of the two, and the treatment of the assured by the insured, or possi-

bly his declared intentions, the assured has a reasonable right to expect some pecuniary advantage from the continuance of the life of the insured, or to fear loss from his death. On this principle a father would have an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father. So would a wife in the life of her husband, and a husband in the life of his wife. But a brother or sister would not have such interest in each other, nor a nephew in an uncle, unless some facts outside of the mere relationship are shown, though those facts might be very slight."

In *Conn. Mutual Life Insurance Co. v. Schaefer*, 94 U. S., 457, the court, on page 461, cites these sections of Bliss, as well as Sections 102 to 111 of May on Insurance, which are to the same effect, and says that all the authorities of importance are collected and arranged in these works. See especially Section 107s, May on Insurance.

We find nothing in the petition in this case, as has already been said, tending to show any insurable interest in the plaintiff in the life of the insured other than the mere fact that they were brothers, and this is not sufficient. It follows that the demurrer to the petition was properly sustained, and the judgment is affirmed.

Mathews & Orgill, for plaintiff in error.

C. L. Selzer, for defendant in error.

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CONSPIRACY TO BURN A BUILDING.

[Circuit Court of Fulton County.]

GEORGE HUTCHINSON V. THE STATE OF OHIO.

Decided, January, 1906.

Arson—Sufficiency of Indictment Therefor—Ownership of the Property—Procurers and Abettors of the Offense—Evidence of Official Stenographer—Presumption as to Accuracy of Stenographic Notes—Presumption that Trial Judge did not Err—Proof of a Conspiracy—Conversations with Co-conspirators.

1. An indictment for arson properly charges the ownership of the property when the owner named is the holder of the legal title.
2. Where a building to which a wife held the legal title was set on fire and burned under circumstances indicating guilty complicity of the husband, and there is no evidence that she had any connection with the crime, an indictment charging him with arson is proper, rather than one charging him with intent to defraud an insurance company, although such may have been his intent.
3. One who aids, abets, or procures the burning of a building may be prosecuted as a principal offender.
4. Where an official stenographer testifies from her stenographic notes, the presumption, the absence of evidence to the contrary, is that the trial judge determined she was using them for a purpose legally competent.
5. If the court permitted a stenographic report of testimony taken in a previous trial to be read in evidence, a transcript thereof should be deemed to be in evidence, with the privilege to the opposite party of examining it and cross-examining upon it.
6. Inasmuch as an official stenographer is an officer of court and under oath accurately to report the testimony offered, query whether a presumption does not arise in the absence of evidence to the contrary, that the report so made is accurate.
7. Where there is proof of a conspiracy between the defendant and S to burn a building, the testimony of P to the effect that in furtherance of the conspiracy he was employed by S to do the act, is competent as a part of the *res gestae*, even if it involves a statement of S to P implicating the defendant.
8. The proof required to establish a conspiracy for such a purpose is not proof beyond a reasonable doubt, but such proof as fairly raises a presumption or inference of a conspiracy.

* Motion for leave to file petition in error in Supreme Court overruled on February 20, 1906.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

In the case of George Hutchinson against the State of Ohio, the plaintiff in error brings the case here for the purpose of a reversal, if his contentions are correct, of a judgment of conviction in the court of common pleas of this county. He was tried and convicted upon an indictment charging him with arson, said to have been committed on the 10th day of August, 1896, in the burning of property of Rebecca Hutchinson who, it is agreed, was the wife of the plaintiff in error here, the defendant below.

Several grounds are urged upon the court as reasons for setting aside the verdict below and reversing the judgment therein. In the limited time at our disposal we shall not be able to discuss at great length the various propositions made. Our attention has been especially invited in argument to the following claims:

That the indictment does not correctly describe the offense which was disclosed by the evidence, if any offense at all was so shown.

That the court erred in permitting the introduction of evidence upon the trial, and especially the testimony of John Page as to a certain conversation or certain conversations said by him to have been had between him and one Swisher, in the absence of the defendant below.

That the ownership of the property was not correctly described in the indictment, it being therein alleged as owned by Rebecca Hutchinson, when, as contended, it should have been charged as being owned by a man named Holden, otherwise called Nicely, who, at the time of the destruction of the building, was its tenant.

That the court erred in permitting the introduction of the testimony of the witness Nellie Brown, an official stenographer of the court, it being claimed that she read from her stenographic notes of the testimony given upon a former trial, or a part thereof.

That the court erred in permitting the evidence as to the amount of the insurance which had been taken out and was in force upon the building at the time of the fire.

And generally, that the verdict is not sustained by the evidence.

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Some of these questions seem to us very substantial and important, and one or two others of almost equal difficulty, though based rather upon technical rights, perhaps, than really substantial ones.

Without tarrying too long upon the form of the indictment, it is sufficient to say that we think the indictment properly charges the ownership of the property in Rebecca Hutchinson. The testimony discloses that the title was *prima facie* in her and that Holden, or Nicely, by whatever name you call him, occupied the property simply as her tenant. Whether or not the indictment might have charged the ownership as in Nicely, we think that it was entirely proper to charge it as in the person who held the legal title.

A more important question is that raised by the contention as to whether it was proper to charge the defendant with being guilty of arson in the destruction of the property of another, instead of charging him under another section of the statute for burning property with intent to defraud an insurance company. We think it very clear that the defendant could not properly be charged as burning his own property with intent to defraud an insurance company. He was not the owner of the property. Whether or not he might have been indicted and tried under the section of the statute referred to, Revised Statutes, Section 6832, upon the basis of the other statute that one who aids, abets or procures another to commit a crime may be prosecuted and punished as the principal offender, it is not necessary for us now to determine. There is no evidence that we have discovered in a very careful examination of the bill of exceptions that his wife, Rebecca Hutchinson, procured the defendant to set this building afire. So that without regard to the form of the indictment, it can hardly be contended that there would be sufficient justification under the evidence here for the claim that he aided and abetted his wife in the destruction of the property, or that she conspired with him or he with her for the setting fire to her building for the purpose of defrauding an insurance company. We think he was properly indicted under the statute which punishes the burning the property of another—Section 6831, Revised Statutes.

The contention of the state as to the facts is that Hutchinson, the husband of the owner, for the purpose of defrauding an insurance company, because it is not disguised that that was his motive if he entered into this transaction, employed one Swisher to burn or cause to be burned the building in question; that Swisher employed John Page to do the same thing, and that Page, connecting with himself a man named English, did the direct act of destroying the building. It is not contended that Page himself set fire to the building, but he entered according to the claims into so close connection with the transaction that it may fairly be said that he was one of the two committing the overt act, that is to say, he carried English in his vehicle to the place where the building was destroyed, taking with him at the same time some coal oil; that he was present when shavings were prepared and placed against the building, and that, although he went away a short distance, he came back before the building was destroyed and then took English away with him. We think it may fairly be said that the destruction of the property was directly caused by these two men—Page and English. It does not appear that either Hutchinson or Swisher took any active part in the transaction itself. The testimony tends to show that Hutchinson and Swisher procured the two men who directly caused the fire, and the question then arises as to whether Hutchinson was properly indicted as a principal offender. It is contended with great earnestness that he should have been indicted for aiding and procuring another to do the act; that he should not have been charged with the burning of the building directly. And some cases have been cited in support of this proposition; among them the case of *Chidester v. State*, 25 Ohio St., 433. In a case decided by this court in 1890, while Judges Scribner, Haynes and Bentley were upon the bench and were sitting in the case, this question was touched upon and to some extent discussed. The case is the somewhat famous one of *Lydia Devere v. State of Ohio*. Lydia Devere was convicted and sent to the penitentiary upon the charge of forging and uttering forged paper. And it is said that Lydia Devere is the same person who within the memory of all of us—at a very recent date—was tried and convicted for violation of law under the name of

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Cassie Chadwick. Without stopping to read the case, it is sufficient to say that she was indicted for forgery and, I believe, uttering forged paper. The case is reported in 5 Circuit Court Reports, 509. I read from the language of Judge Bentley on page 531:

“It is also said by counsel for defendant that she could not be convicted under the second count of the indictment for uttering this note, and *Brown v. State*, 18 O. S., 508; *Chidester v. State*, 25 O. S., 438, and certain English reports, are cited in support of that position. At the time that the cases in the 18 O. S. and 25 O. S. were decided, the section of the statute bearing upon the subject was different in form from the provisions that existed at the time of the transaction in question here. Section 6804 now reads, as it did not then: ‘Whoever aids, abets, or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender.’ Since the other decisions were made, the Supreme Court in *Hanoff v. State*, 37 O. S., 178, have construed this section, and have given particular emphasis to the word ‘prosecuted’ as appearing therein; so that it is now held, by the provisions of this section, that the indictment may charge an aider and abettor as if he were the principal offender, the word ‘prosecute’ being broad enough to have reference to the form of the indictment itself. So that whatever objection might have been taken in this line prior to the amendment of Section 6804 is no longer tenable.”

Motion for leave to file petition in error to the Supreme Court was by that court overruled.

The case of *Hanoff v. State*, 37 Ohio St., 178, should be read in this connection. It is our view that the indictment was properly drawn under the section of the statute providing that aiders, abettors and procurers may be prosecuted as principal offenders.

We come then to the questions raised during the trial of the case as to the admission of the evidence:

The testimony of Nellie Brown, stenographer, contains certain references to the notes which she had taken upon the trial of Swisher, who was himself prosecuted for his complicity in this alleged crime. It is not said in the introduction of this testimony that she was giving the contents of any writing, that she was reading from her stenographic notes, or any transcript thereof; but she was asked the direct question as to what was testified to

on the former trial, and her answer was given to that question. Objection was made to her reading from the notes. Nothing was said by the court below as to whether his observation led him to the judgment that she was reading from the notes, or whether she was testifying from her recollection of the testimony on the former trial, refreshing herself by an examination of her own notes. Later she was asked the question as to whether all that she had read was from her official notes taken on the former trial, and she answered in the affirmative. But it nowhere directly appears that the testimony which was first objected to was read from the notes, and in considering whether or not the court below erred, presumption must be permitted in favor of the record below. In other words, the court is not presumed to have erred; he saw the witness; he could determine for himself whether she was testifying from memory or from a reading of the notes which were in her hands, and we are not disposed to hold, under the circumstances, that error was committed by the court in this respect.

There is another principle which may possibly apply to the consideration of this question. That is, the extent to which the rule of the Supreme Court in the case of *Moots v. State*, 21 Ohio St., 653, and *Shriedley v. State*, 23 Ohio St., 130, should apply. Those cases recognized the propriety of permitting in evidence in the one case a record, in the other certain check slips made by a witness for the purpose of preserving the information of some transaction where the memory of the witness would be likely to fail, and although in each of these cases the witness may have testified that he had no recollection of the transactions the memory of which was so sought to be preserved, the writings were permitted as original evidence in lieu of the memory of the witness. In the case of *The Pennsylvania Co. v. Trainer, Admr.*, 12 Circuit Court Reports, 66, the Circuit Court of the Seventh Circuit held:

“Where it is claimed a witness who testified upon a former trial has changed his testimony, an official stenographer who took the testimony at the former trial, who produces his notes in short hand of the testimony of the witnesses, may read his notes to the jury as affecting the testimony of the witnesses, if he remembers

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that at the time the testimony was correctly taken, and that the notes contain all the testimony of such witness, although at the time he is called upon to testify he has no independent recollection of what the witness did testify."

That is the syllabus; whether it was prepared by the judges or by a reporter, I do not know. On page 69, Judge Frazier, announcing the opinion of the court, says:

"Counsel for defendant in error cite a number of authorities in support of the proposition that the notes of a stenographer, like other writings made by the witness at the time of the occurrence, can only be used to refresh his memory."

And then certain quotations are made from one or two works and the judge adds:

"It has long been an established rule of evidence that a witness who has made entries in a book or reduced to writing facts which he is required to do in the regular order of his employment, on the day they purport to have been made, though he has now no independent recollection of the facts mentioned in it, if he remembers that at the time, he knew the facts were correctly stated, may be permitted to use it to refresh and assist his memory; but the writing itself must be produced in court, in order that the other party may, by cross-examination, have the benefit of the witness refreshing his memory by every part. The American courts have carried the rule farther than it has been carried in England, by admitting the writing itself to go in evidence to the jury in all cases where it was made by the witness at the time it occurred, for the purpose of preserving the memory of it, if, at the time of testifying, he can recollect nothing further than that he had actually reduced the whole transaction to writing. 1 Greenleaf on Evidence, Section 437 and note 3 to 12th edition; *Moots v. The State*, 21 Ohio St., 653; *Shriedley v. The State*, 23 Ohio St., 130.

"If entries or writings, made by a person in the performance of a private employment, are admitted in evidence upon the testimony of the person who made them that they are correct, although he has no recollection of the facts, why on principle and reason should not the testimony of a witness taken in shorthand by an officer of the court appointed for that purpose, and whose sworn duty it is to correctly report the testimony, be admitted when it is competent to prove it, although the officer at the time of testifying has no independent recollection of what the witness testified.

“The violent changes effected in the modes of procedure by the courts in the last few years, the progress of science, the startling and violent inroads effected by the telegraph, the telephone, the phonograph, the application of electricity as motive power and to other purposes with the application of photography in evidence, and the employment of court stenographers, have placed the line of relevancy far beyond what would be recognized by the courts of even twenty years ago. * * *

“A recent author says: ‘At the present time the custom of employing a court stenographer, whose duty it is to take down the testimony of the witnesses examined, is nearly universal. He is usually a sworn officer of the court, and his notes or transcripts of them possess an official character and authenticity which render them of great value in case of the subsequent death or absence of a witness. Where such records exist, their production on the subsequent trial should, it seems, be required under the rule requiring the production of the best evidence.’ Underhill on Evidence, page 171.

“In Rice on Evidence, Vol. 1, p. 399, referring to stenographer’s report of the testimony taken upon a former trial by a witness since deceased, says: ‘There is no substantial reason why the testimony taken in such trial should not be read. The party was on the stand, and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict.’ ”

Tarry but for a moment and consider this case in which Judge Frazier renders the opinion. I may say that it should be remembered that we have a statute permitting the introduction of a stenographic report taken upon a former trial under certain circumstances, where a witness has died or has so departed from the jurisdiction of the court that his oral testimony is not at the time of the trial obtainable. Judge Frazier, after citing another authority in the case, *Bennett v. Syndicate Ins. Co.*, 39 Minn., 254, and a text book, 2 Rice on Evidence, 658, says:

“It is a rule of universal application that a party must produce the best evidence within his control, and though the notes of a stenographer may not be the best evidence in the sense that it excludes all others, experience teaches that it is more reliable than unassisted memory, and in practice is consulted with deference by counsel and judges in cases of controversy or doubt as to what a witness said.”

Without going further with a consideration of this question or further quotations from this opinion of Judge Frazier, it is enough to say that we think the reasoning by Judge Frazier is worthy of most careful consideration and thought. We do not find it necessary to adopt the principle in this case that wherever an official stenographer presents in court a stenographic report of the testimony of a witness on a former trial whose testimony is sought to be impeached or the testimony of a party on a former trial where admissions of that party would be relevant, that such a stenographic report would be admissible in evidence. I say we are not forced to that conclusion because of the reason which I have already given that it does not affirmatively appear in this case that the stenographer read to the jury the particular part of the testimony which was objected to. If the stenographer did read it to the jury, that was equivalent to offering it in evidence to the jury. If the court permitted it, the stenographic report or transcript thereof would in that case be deemed to be in evidence so that the opposite party had opportunity for examination of it and cross-examination upon it. We think that no error is apparent in the admission of the testimony of Nellie Brown, the official stenographer. Before leaving this branch of the case it might be properly added that the statute itself for the appointment of stenographers requires that they shall take an oath accurately to report the testimony, and we have a principle well recognized in the courts that an officer will not be presumed to have failed in the performance of a duty. There is no presumption, in other words, that the report taken by an official stenographer, sworn to make an accurate report, is inaccurate. On the contrary, it might, perhaps, properly be held that there is a presumption of accuracy, a presumption that the officer performed her duty, and that without other evidence or without her statement that she had correctly reported the testimony, the court in the absence of any evidence of inaccuracy might permit it to go to the jury. It is not, however, necessary for us in this case to go that length. I simply submit the matter as a query.

Did the court err in the very important matter of admitting the testimony of John Page as to what had been said to him by

Swisher, including the statement by Swisher, in substance, that he had been employed by Hutchinson to commit this crime?

Clawson v. State, 14 Ohio St., 234, was cited by one of the counsel for plaintiff in error in support of the proposition that on the trial of a defendant charged with crime, evidence of the declarations of a conspirator for the commission of such crime, made in the absence of the accused, is not admissible to prove either the body of the crime or the existence of the conspiracy, unless they either so accompany the execution of the common criminal intent as to become a part of the *res gestae* or in themselves tend to further the execution of the common criminal intent.

Assuming for the moment the existence of the conspiracy and dealing with the question as to how far the testimony of one conspirator may be used against another, it may be said in response to this contention of counsel for plaintiff in error and the citation of the case referred to, that if Swisher was a co-conspirator with Hutchinson, if Swisher had been employed by Hutchinson to destroy this building under such circumstances as would make it a crime, the whole conversation which Swisher had with Page was surely in furtherance of the conspiracy, because he was simply causing by means of that conversation the destruction of the building; he was employing another to carry on the work, and in doing that he was telling that other the occasion for it, who was employing him to do it. We are not quite disposed to go so far as to hold that the statement in that conversation by Swisher of what had been said to him by Hutchinson could be taken as affirmative evidence of the statements by Hutchinson; but we do hold that if there was sufficient proof to justify the introduction of the testimony as to the conversation at all, I mean if there was adequate proof of the conspiracy between Swisher and Hutchinson, that then this conversation was necessarily and properly shown as one of the links in the chain of causation, the ultimate result of which was the destruction of the building in violation of law. Without that there would be a missing link in the chain; the chain would be broken, and it could hardly be said that Hutchinson had caused the fire. This was a passing along by sequence of events the act of Hutchinson in first pro-

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curing, if he did procure, Swisher to commit the crime. It was passing it on, and every transaction from Hutchinson to English would be competent in evidence as bearing upon the original cause of the ultimate effect.

We think that that evidence was properly admitted. The effect of it, and the effect of every part of it, was a question for subsequent consideration, and no request appears to have been given to the court for instruction to the jury that they could not consider the statement of Swisher to Page as evidence of what Hutchinson had said to Swisher. If the evidence was properly admitted, and if the use of it was to be restricted as simply having the effect of passing along the act to furnish the link in this chain of causes, in other words, of employing Page to go on with the transaction and carry it to a conclusion, I say if it was to be so restricted, it would have been proper for counsel to ask the court for a specific instruction to that effect and for the court to have given it; but no such request seems to have been made; at least, our attention has been called to none, and no exception was taken to any action of the court in refusing.

An effort was made by counsel to eliminate this evidence in its entirety from consideration by the jury, and we think that the request in that direction was by the court properly refused. But was Swisher a conspirator with Hutchinson so that testimony was properly admissible as to the statements and acts of Swisher in furtherance thereof? Up to the time of the introduction of this testimony the evidence to support the charge of conspiracy was very slight, if there was any at all. The evidence upon this subject was introduced in substance, after the court had made its ruling permitting Page to testify to what Swisher had said to him. There is no arbitrary rule as to the order in which evidence shall be introduced upon the trial of a cause; this matter must rest largely in the discretion of the trial court. Ordinarily, it would unquestionably be better before the testimony as to statements of a claimed conspirator is admitted that adequate evidence should be given of the conspiracy; but we think that there was no abuse of discretion on the part of the court in permitting this evidence to come in, if it was finally made competent by sufficient evidence of a conspiracy.

What is sufficient evidence of a conspiracy? Evidence to satisfy the court beyond a reasonable doubt that a conspiracy exists is not required. It is sufficient if a conspiracy is established by *prima facie* evidence, evidence which makes a *prima facie* case, which fairly raises a presumption or inference of a conspiracy: and in this case we are not disposed to differ with the court below that there was sufficient evidence to justify the inference that these men had formed a combination for the purpose of committing a crime, the crime charged in the indictment. It is true that a large part of the evidence comes in the form of the testimony of men who were themselves conniving at or taking part in this criminal offense. Their evidence should be received with caution: and the court properly instructed the jury as to the caution with which the testimony of an accomplice should be received. But after all, we think that there was such a combination of circumstances here, and there are so many witnesses testifying as to facts bearing in one way and another upon the claimed guilt of this defendant, that we are not disposed to hold that the court erred in the first place in permitting the testimony of Page as to his employment by Swisher to go to the jury.

And along the same line, and upon the vital question as to whether the jury erred in finding this defendant guilty under the evidence which was submitted, we are not disposed to hold that the evidence would not justify a conviction. Twelve men saw the witnesses upon the stand; they heard them testify, and notwithstanding the fact that some of these witnesses were themselves violators of law, still, in view of all the circumstances, the appearance of the witnesses, the manner in which they testified, the many circumstances which are not brought so clearly to our attention as to the attention of the trial judge and the trial jury, the latter found this man guilty of the crime defined in the indictment. Considering the case in its entirety, we have concluded that the judgment of the court below in overruling the motion for a new trial ought not to be disturbed, and the judgment will, therefore, be affirmed.

Files & Paxson, for plaintiff in error.

Handy & Wolf, for State.

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RIGHTS OF MORTGAGEE UNDER FIRE INSURANCE POLICY.

[Circuit Court of Allen County.]

**FIREMENS' INSURANCE CO. v. CATHERINE E. BOLAND AND
CLARA E. AGNER. ***

Decided, 1904.

Insurance—Mortgagor not the Agent of Mortgagee in Procuring—Fraud of Mortgagor in Procuring—Not a Defense Against Claim of Mortgagee, When.

1. A mortgagor is not in any sense the agent of the mortgagee in procuring insurance on the mortgaged premises for the benefit of the mortgagee as his interest may appear and in accordance with an agreement so to do.
2. Where the mortgagee is not a party to the procuring of the insurance contract, and had no knowledge of fraud in the procuring of the insurance, an allegation of fraudulent representations and concealments on the part of the mortgagor in the procuring of the insurance does not constitute a defense to the claim of the mortgagee under the policy.

NORRIS, J.; MOONEY, J., and DAY, J., concur.

The defendant in error, Clara E. Agner, brought this action in the court of common pleas against the Firemens' Insurance Company to recover on a policy of insurance for loss by fire, which loss she claims was covered by said insurance. To this action Catherine Boland was made a party defendant. She filed her amended answer and cross-petition in which she asserts with other averments that at the time the policy was issued which secured the loss from thence on, and at the time the property was destroyed by fire, she held a mortgage on the property, and the policy provided that the loss be paid to her as her mortgage interest may at the time of the loss appear, and that it was further stipulated by said policy that the insurance of her said mortgage interest as mortgagee in the property in-

* Affirming *Agner v. Firemen's Insurance Co. et al*, 2 N. P.—N. S., 254; affirmed by the Supreme Court, without report, 73 O. S., —.

suer should not be off-set or invalidated by any act or omission of the mortgagor to whom the policy was issued.

The answer of the defendant company to this pleading of Catherine Boland is by its first defense a denial. By its second defense it asserts that it is stipulated in the policy that the policy should be void if the assured had at its issuance or afterwards in the life of the policy procured other insurance upon the same property, that by specific provision of the policy the same issued subject to the foregoing prohibition which could not be and was not waived by any officer, agent or representative of defendant company; that the policy further provided that if with consent of the company an interest under the policy shall exist in favor of a mortgagee the aforesaid provision shall apply in manner expressed in such conditions as shall be written upon, attached or appended to the policy.

The defendant says that this Catherine Boland, prior to the 25th of July, 1900, was the owner of the property described in the policy, and on that date conveyed the same by deed to Clara E. Agner, and that while Catherine Boland was the owner she procured and there was issued to her by the Washington Insurance Company of Cincinnati, O., an insurance policy on said property insuring the same against loss, etc., by fire in the sum of \$1,500, and when she sold and conveyed the property to Clara E. Agner she duly assigned and transferred said policy to Clara E. Agner. The policy was issued on the first of October, 1889, insured the property for three years from that date, and so continued for said time in force, which period covered the date of the fire. This policy in said Washington Insurance Company when it was assigned was made payable to Catherine Boland, mortgagee, as her interest may appear; that defendant's policy here in suit was issued January 17, 1901, and while the Washington Insurance policy was in force. The mortgage clause in this defendant's policy was thus made at the request of both Clara E. Agner and Catherine Boland. Defendant says that when it issued its policy neither the defendant nor any of its agents had knowledge or notice of the existence of the policy of the Washington company; that Clara E. Agner and Catherine Boland and each of them failed to inform defendant of said

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insurance in the Washington Insurance Company; and neglected to secure consent of defendant company to said insurance; that defendant did not waive the provision of its policy prohibiting other insurance, and did not consent that said provision of its policy be abrogated. Wherefore it says that Clara E. Agner and Catherine Boland each failed to comply with the terms of the policy, and that by reason of the foregoing the policy is void.

The third defense disputes and denies the amount of the loss; pleads that by the terms of its policy it is not liable for a greater proportion of the loss than the amount of its insurance bears to the whole insurance on the property; that the property was insured by the Washington Insurance Company in the sum of \$1,500. As a fourth defense the defendant company pleads a stipulation of the policy that the same shall be void if the insured fails to make known any fact material to the risk, or conceals or misrepresents in any manner any material fact or circumstance concerning the insurance of the subject thereof, and that all fraud or attempt at fraud by false swearing by the insured touching the insurance, or any matter relating to it, whether before or after the loss, shall forfeit all claims under the policy; that within thirty days after the loss the insured shall render an account under oath of the loss, the actual cash value of the property insured, the amount of loss and when and how the fire originated.

Defendant says that plaintiff did furnish such statement at the request of Catherine Boland in which plaintiff falsely swore concerning this matter, and that plaintiff and Catherine Boland knew that the statement was false, and the same was made by plaintiff to defraud the defendant company; that plaintiff falsely swore as to the amount of insurance on the property at the time the fire, and as to the origin of the fire and plaintiff's knowledge of it.

As a fifth defense the defendant says that the policy stipulated that in case of disagreement concerning the loss the matters in dispute shall be left to appraisers or arbitrators; that the loss is not payable until sixty days after such estimate and sat-

isfactory proof of loss is received by the company; that defendant at once notified plaintiff that said proof was unsatisfactory and that it did not waive any provision of the policy; that by the terms of the policy no action is sustainable until these provisions are complied with by the insured, and that plaintiff has not complied with these conditions.

A general demurrer was filed to the second, third, fourth and fifth defenses of this answer. This demurrer was overruled as to the third defense and sustained as to the second, fourth and fifth defenses. To the first and third defenses of the answer of said defendant company to her cross-petition Catherine Boland filed a general denial.

Upon the issues thus tendered by the pleadings and the evidence the case was submitted to a jury, which rendered its separate verdicts each against the defendant insurance company, one in favor of Clara E. Agner and one in favor of defendant Catherine Boland. Upon motion in that behalf and for a new trial the court set aside the verdict in favor of Clara E. Agner, and the defendant company thereupon filed its motion to set aside the verdict in favor of said Catherine Boland and for a new trial upon the issues raised by its answer and cross-petition and the answer of defendant company thereto, and the reply of Catherine Boland to said last named answer. The court overruled said motion and entered its judgment on the verdict rendered by the jury against defendant insurance company and in favor of Catherine Boland.

The defendant insurance company seeks to reverse this judgment and finding of the common pleas court assigning as its causes that—

1. The court erred in overruling defendant's motion for a new trial.
2. That the court erred in sustaining the demurrer of Catherine Boland to the second, fourth and fifth defenses in the answer of the defendant to the amended cross-petition of Catherine Boland.
3. Erred in the charge to jury.
4. Erred in refusing to charge as requested.

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5. That the court erred in rendering judgment in favor of Catherine Boland against defendant insurance company, and in not rendering judgment in favor of said defendant insurance company and against said Catherine Boland.

6. And for other errors appearing upon the face of the record.

The motion for a new trial urges that in addition to the specific charges in the petition in error:

1. That the verdict is against the weight of the evidence.

2. That the verdict is excessive.

3. Error in overruling the defendant's motion to direct the verdict for defendant against Catherine Boland.

4. Error in refusing to submit to the jury certain interrogations requested by defendant.

5. Error in the admission of evidence over defendant's objection and in requesting evidence offered by defendant.

Addressing these various complaints to the case submitted to the jury (on the issues tendered by the pleadings) after action of the court upon the demurrer of Catherine Boland to the answer of defendant to her cross-petition, the record exhibits no error which warrants a reversal of the judgment. This being true, the assignment left for consideration goes to the demurrer and the judgment of the court sustaining the same as to the second, fourth and fifth defenses. The second defense is a direct attack upon the validity of the policy, claiming that no contract of insurance was effected between the defendant Clara E. Agner, the owner of the property, and the mortgagor in the mortgage of Catherine Boland, and that because of this the mortgage clause in the policy for the benefit of Catherine Boland's mortgage interest in the property was without foundation and never caused a valid obligation of the defendant insurance company. The mortgagee intended to be insured. It was her contract with the mortgagor that her mortgaged interest should be insured, not by a void insurance policy, but by a valid insurance policy, by a valid contract of insurance. The defendant company intended to insure the mortgagee, not by mere pretense, but validly; not by an agreement that merely seemed upon its fact to afford protection to

the mortgagee, but by a contract which in good faith and in fact did protect and was an insurance of her mortgage interest. This was in all respects the intention of all parties, and all this defendant might and does concede to be true, and that such insurance between plaintiff and defendant; and were it not further issued its policy of insurance there was other insurance on the property protecting the mortgagee as well as the plaintiff, and which fact prevented the conclusion of a valid contract of insurance between plaintiff and defendant, and were it not further for the false representations and concealments concerning this last named policy and the existence of it, by the plaintiff, the mortgagor, who obtained this influence in controversy, and the further fraudulent and false representations and concealments of plaintiff concerning the value of the property, the amount of loss, the cause of the fire, and other matter vital to the obligation of defendant to the plaintiff on the policy, and these are pleaded in defense to the claim of the mortgagee.

These facts of the plaintiff who obtained the policy and to whom the policy was issued and these failures and defaults of the plaintiff to act, as the policy stipulated she should act, in order that the contract be a valid contract between the plaintiff and the defendant company, are interposed in excuse of the obligation of the defendant company to the mortgagee. These defenses as against a general demurrer of the mortgagee the court held not to be available, and that the vice pleaded which rendered the contract as between the assured, the mortgagor and the defendant company to be fraudulently concealed and void, is not fatal to the claim of the mortgagee under the contract of insurance with said company.

It is written in this policy "that if with the consent of this company an interest in this policy shall exist in favor of the mortgagee or in favor of an interest other than the interest of the assured, the condition hereinbefore contained shall apply, in manner expressed in said provision of insurance relating to such interest, as shall be written upon, attached or appended hereto."

So it would seem that the conditions and provisions relating to the insurance and protection of the mortgagee's interest, if

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in conflict with the provisions and conditions "hereinbefore written" concerning the interest of the assured, then the provisions and conditions of the policy which are applicable to the contract as between the assured and defendant company, must give way and must be applied to the contract and cut such figure in it as are expressed in the provision relating to such interest as shall be written upon, attached or appended to the policy.

So that whether the contract of insurance concerning the interest of the mortgagee be conceived with the policy and concurrent with it, and written upon it, or whether it be a contract made after the policy issued, and attached or appended to the policy, the provisions of said contract relating to such interest, which is not the interest of the assured described in the policy, shall control, and when the general conditions and provisions of the policy are applied to the contract of insurance which insures the interest that is not the interest of the assured. Wherefore it would seem that by the very terms of the policy the contract insuring the interest of the mortgagee is recognized and treated and made as a contract of insurance between the insurance company and the mortgagee separate, distinct and apart from the contract which insures the interest of the assured, and such has been the interpretation of the courts in cases to be found in the very excellent briefs of counsel on both sides of this case.

By the terms of the contract of insurance between the mortgagee and the defendant company it is stipulated "that terms of policy as to the interest of the mortgagee shall not be affected or invalidated by any act or neglect of the mortgagor, the applicant for insurance."

It is claimed by the defendant company that this stipulation refers only to acts and omissions of the assured after a policy has issued which in its inception afforded valid protection to the interest of the mortgagor, the assured, and that if the policy was void at its inception as to the mortgagor and her interest, then that the vice did not destroy a contract that was once efficient, but prevented any valid obligation because of the policy, not only as between the mortgagor and the defendant company, but also as between the mortgagee and the defendant com-

pany, and that no contractual relations arose from the policy or were evidenced by it, or by any of its stipulations or by any stipulation that might be written on it, or attached or appended concerning any interest in the property described in the policy which was not the interest of the mortgagor, the assured, and all this because the acts of the assured, or the omission of the assured to act in matters leading to the contract relating to her and her interests, make it not a valid obligation at any time in her behalf.

It is not claimed in the answer that Catherine Boland was an applicant in plaintiff's behalf for insurance upon the interest applicant for this policy or in any way concerned herself as an of the mortgagor. She made no representation which induced such insurance, and concealed no fact that, from her relation to the mortgagor and the defendant company concerning the interest of the mortgagor, the assured, she was called upon or under obligation to reveal.

There was no act which the mortgagor, the applicant, was called upon to perform and which she, the applicant, omitted or neglected to perform concerning her, the applicant's, interest which it was the duty of Catherine Boland to perform. There was no fact connected with the interest of the applicant, the assured, in the property described in the policy and material to the applicant's risk which she, the mortgagee, in her relation as mortgagee was required to make known to the defendant company, and there is no allegation here in this behalf. So that no act on her part and no duty unperformed by her made void, or tended to make void the contract of insurance between the plaintiff, Clara E. Agner, the mortgagor, and the defendant company; and any attack which the company might or could make upon the policy as it related to the mortgagor, could not by commission or omission forfeit the rights of the mortgagee, who held no right in the insurable interest of the mortgagor or concerning it.

The defendant company contemplated the possibility of concealment and fraud by the applicant, the mortgagor, in obtaining her insurance and of concealment and falsehood concerning the property, the fire, the loss and otherwise, and discounted all

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this by proper provisions in its policy as to its liability in such event to the mortgagor under the policy, and it stipulated with the mortgagee that it would receive the premium from the mortgagor, applying the condition of the policy in which it provided against all these acts and omissions and concealments of the mortgagor, so as not to affect or make invalid its obligations to the mortgagee; and to make itself safe on its liability thus assumed in case of loss, it stepped into the shoes of the mortgagee, and by its contract became and was subrogated to all the rights, liens, claims, security and indemnity of whatever character that the mortgagee had or could have concerning her interest in the property described in the policy, which so far as appears to the contrary would include the indemnity, if any, afforded by the policy of the Washington Insurance Company of Cincinnati, as well as all else by which her mortgage interest was in any ways protected.

It would not appear that Clara E. Agner, the applicant for the policy, the person to whom it was issued, in whose favor it purported to insure an interest to which Catherine Boland was a stranger, could either make or destroy the contract between defendant company and the mortgagee, any more than could the mortgagee by her act or omission make or destroy the contract between defendant company and the mortgagor.

That the contract of insurance between defendant company and mortgagee was made at the request of the mortgagor, we consider of no importance here. It was not a request that defendant company perform some duty or act, or create or assume some obligation which the mortgagee owed to any one. It was requested that the defendant perform a duty and comply with and carry out an obligation which the mortgagor, the applicant for the policy, owed to the mortgagee, Catherine Boland, so that the relation of principal and agent, as between the mortgagor and mortgagee could in no aspect of this controversy arise.

We are of the opinion that the common pleas did not err in sustaining the demurrer to the second, fourth and fifth defenses of the answer of defendant company to the cross-petition of Catherine Boland, and finding no error in the record to the

prejudice of plaintiff in error, we must affirm the judgment. The costs are adjudged against the plaintiff in error. Execution is awarded and the case is remanded for execution.

J. W. Mooney, for plaintiff in error.

Joseph P. Hanley, for defendants in error.

INJURY FROM THE ESCAPE OF AN ELECTRIC CURRENT.

[Circuit Court of Lucas County.]

THE TOLEDO RAILWAYS & LIGHT COMPANY V. CLARA RIPPON,
ADMINISTRATRIX.

Decided, June 23, 1906.

Electric Wires—Negligence in Permitting Current to Escape—Proximate Cause of Injury from Fugitive Current—Presumption of Ordinary Care—Burden of Proof—Charge of Court.

1. A negligent act or omission to act becomes direct and proximate in its relation to a claimed event, when the event is the natural and probable result of such negligent act or omission, and one which in the light of the circumstances should have been foreseen as likely to occur.
2. To make negligence a proximate cause of an injury, it is not necessary that the precise result which occurred should have been anticipated. If in the light of the circumstances results of that general character should have been anticipated by ordinary foresight as likely to occur, that would, so far as that question is concerned, be sufficient.
3. If, in the exercise of ordinary foresight, and the light of the circumstances, the negligent escape of a powerful current of electricity from the wires of a power company to those of a telegraph company should have been anticipated by the former as likely to occur, such negligence will be deemed the proximate cause of the death or injury of an employe of the telegraph company occasioned by his contact, while in the performance of his duties, with his employer's wires so charged.
4. A party is not held to the anticipation of extraordinary events; but storms deranging to some extent the wires of electrical companies are not extraordinary events, so unusual or unprecedented as to relieve such companies from the legal necessity of reasonable precautions to protect others from dangers caused thereby.

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5. The high degree of care to which a company may be held with reference to the control of a dangerous electric current, is only ordinary care in view of the danger to be apprehended, and the burden of proving that such care was not exercised is upon the one complaining of injury from the escape of the current.
6. An intimation in the charge to a jury, that a presumption exists and remains throughout the case that the plaintiff was not guilty of contributory negligence, but exercise ordinary care, is not prejudicial; that negligence of the plaintiff need be shown by a preponderance of the evidence only.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding in error to reverse the judgment of the court below in favor of the administratrix of the estate of Robert Rippon, deceased, and against the Railways & Light Company, based upon the verdict of a jury for \$4,000.

Robert Rippon was an employe of the Western Union Telegraph Company, and while in the discharge of his duties, he was killed by coming in contact with an electric wire of that company which had been charged with a powerful and fatal current of electricity escaping from the wires of the Railways & Light Company.

The case is not complicated by any particular dispute as to the negligence of the defendant company. By Section 3471-3 of the Revised Statutes of Ohio, the Railways & Light Company is charged with a certain duty of protection of its wires, so as to prevent the escape of a dangerous current of electricity therefrom. After providing that a company organized for the purpose of supplying electricity for power purposes and for lighting streets and buildings of municipalities may have certain privileges and franchises essential to the carrying on of their work, the statute provides further that—

“All wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.”

The mischief here was caused, as the petition claims and the evidence, we think, sufficiently discloses, by the placing of one of the power wires carrying a large voltage of electricity in

too close proximity to one of the wires of the telegraph company which had theretofore been conducted into the building and to a clock moved by the power of an electric current. The defendant power company, some two years or so after the telegraph wire had been so carried into the building and connected with the clock, placed one of its wires for the conduct of the larger and dangerous current within the same porcelain duct in the wall of the building, so that the two wires were brought almost in contact, and although at the start, perhaps, sufficiently insulated, the insulation was liable to become frayed and rubbed away by the friction of the wires against each other, by reason of action caused by winds or storms or otherwise; and it is said that snow was liable to collect within the porcelain duct between the wires or against them, so as to afford further means for the passage of the current by induction from the one wire to the other.

Just previous to the fatal occurrence which is made the basis of this action, a severe storm had deranged the wires of at least the telegraph company, and it had become necessary to do some repairing or remedying of the difficulty. It is unnecessary that I should go into the details. It is sufficient to say that while Mr. Rippon was engaged in restoring the wires to their proper state of usefulness and rendering them safe, by reason of the crossing of one wire with another he received the current of electricity in his body which caused his death. We think there can be no question that the jury was justified in finding the defendant company negligent in the manner in which I have indicated. Not only did the evidence tend to show negligence in the placing of these two wires in juxtaposition or in dangerously close proximity to each other, but we think that the jury was abundantly warranted in finding such evidence sufficient.

It is urged that the defendant power company owed no duty to an employe of the telegraph company. Probably it did owe no special duty to such employe; no duty other than that which might arise from the knowledge of the power company that the escape of a dangerous current of electricity from its wires might cause death or injury to any person, whether employed by the telegraph company, or who by reason of any other fact

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should come in contact with a wire of the telegraph company which, under other circumstances, would not be attended with danger. This question as to what duty was owed by the power company to any person who might be placed in peril by reason of its negligent act, is closely connected with the question of proximate or remote cause. This court has had occasion to examine with considerable care a case in which almost precisely the same question arose, wherein the firm of Marsh et al, of Norwalk, was one of the parties plaintiff associated with certain insurance companies, and Andrew E. Lang, receiver of the Lake Shore Electric Railway, and several other companies, were made parties defendant. The case is reported in 7 C. C.—N. S., page 405. This case affirmed the judgment rendered in the court below, and in Vol. 3, *Ohio Law Reporter*, beginning on page 635, will be found the entire charge of the trial judge, who, as it happens, was myself, in the court of common pleas. The questions involved in that case were so interesting, and, in some respects novel, that they called for a pretty careful examination of numerous adjudications under the comparatively new conditions which have arisen with the rapid progress of applied electrical science. In the charge, which was approved by the circuit court, I said to the jury:

“A negligent act or omission to act becomes direct and proximate in its relation to a claimed event when the event is the natural and probable result of such negligent act or omission, and one which in the light of the circumstances should have been foreseen as likely to occur.”

Now, the attorney for the plaintiff in error here urges that this event in the case at bar, can not be deemed proximate unless the defendant company could have foreseen the particular event as likely to occur. He does not so say in words, but that is the substance of one portion of his argument; in other words, that unless in the exercise of ordinary foresight the power company could have foreseen that an employe of the telegraph company, in repairing wires which had been somewhat demoralized by a storm would be placed in such a position of danger that the negligence of the power company might cause his injury or death by permitting a heavy current of electricity to

reach the wire of the telegraph company, such negligence would not render the company liable. But this question was met in the Marsh case, to which I have referred, in another part of the charge which I gave. Having charged with considerable detail and with some elaboration along the line of this question of proximate and remote cause, I said to the jury in qualification this:

“In this connection it is proper that I say to you as I do, that to make negligence a proximate cause of an injury it is not necessary that the precise result which occurred should have been anticipated. If in the light of the circumstances, results of that general character should have been anticipated by ordinary foresight as likely to occur, that would, so far as that question is concerned, be sufficient.”

So here, if in the exercise of ordinary foresight the power company should have realized that the negligent escape of a powerful current of electricity from its wires might cause injury to a person however employed, however situated, and in whatever part of the city where the network of wires of these companies extends, then the negligence, if it resulted in injury or death to a person in any part of the city and however circumstanced, might be deemed the proximate cause of such injury or death.

The company, of course, was not held to the anticipation of extraordinary events. But surely a storm which deranges to some extent the wires of electric companies is not an extraordinary event; we have those occurrences a number of times in one season, perhaps. We know that the employes of the companies are required to go out immediately after storms to adjust the defects and troubles which have occurred by reason of the storms. These are not events which are unprecedented or unusual, so that the companies are not held to guard against them.

I have, perhaps, dwelt too long upon the negligence of the defendant company and its relation to the death of Rippon. but it has seemed to me well enough to suggest these general principles, applicable to cases of this character, which are not unlikely to come with greater and greater frequency as the companies employing agencies of this kind multiply in number.

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The questions which have called for the larger discussion in this case, grow out of the claims of the assumed hazard and contributory negligence of the decedent. Here the burden rested upon the defendant. It is claimed by the power company that there was sufficient evidence to show beyond dispute that this man ought not to have received the injury even if the defendant company was negligent; but we think that it was a fair question for the jury. It is urged with much earnestness by counsel for plaintiff in error, that the decedent was charged with the duty of inspection of the appliances of the telegraph company, and that in the exercise of his duties he should have discovered the dangerous condition of the wires at the point of entry into the building. We have examined the record. It appears to us that his duties called upon him to examine the electrical clocks of the telegraph company, but we are not convinced, as counsel seem to think we should be, that he must have known—that as a matter of law he should have known—that the power company had placed one of its highly charged wires in close proximity to a wire of the telegraph company. We think that the jury were justified in attaching some force to the fact that for a long time the wire of the telegraph company had remained in a reasonably safe condition, passing through this porcelain duct without being brought into the neighborhood of a dangerous wire. We think it not clear that in the examination of the clocks to see whether they were working rightly, his attention would necessarily be called to the condition of the wires where they entered the building. Especially do we think that his attention would not necessarily be called to the fact that a change had been at some time made in the condition of the wires, from that which had existed for a long time before, when possibly he may have noticed them. Much more might be said upon this subject, but I think it enough to say that it was a question of fact, properly left to the jury for its consideration, and that the verdict is not so clearly against the weight of the evidence in this regard that either the court below or this court would be justified in disturbing it.

It is said that the court erred in some instructions in the general charge, and also in its refusal to give an instruction

asked by plaintiff in error. One instruction to which reference has been made in argument, embodied in the charge of the court, is substantially that a presumption existed in the case, and remained throughout, that the plaintiff was not guilty of contributory negligence, or that he exercised ordinary care. I will not attempt to repeat the precise words and I will not stop to examine the record for a more exact quotation, but I have stated the substance of the instruction with regard to which complaint is made. It may or may not be true that such a presumption of law exists. Persons in official positions are presumed to discharge their duties. Individuals, whether in official positions or not, are presumed to be innocent of wrongdoing. Possibly the same presumption may arise—we do not say that it does—that persons exercise that care which is ordinary exercised by persons of ordinary prudence. But at any rate, whether there be such presumption recognized by the adjudications of the courts or not, the instruction to the jury that the decedent was presumed to have exercised ordinary care called for no other action on their part or consideration of the evidence, than that which the court finally gave to them; and that is, that the negligence, the lack of ordinary care, must be shown by a preponderance of the evidence. The court did not say, nor is the inference to be drawn from what was said, that the jury were required to do something more by reason of the suggested presumption, than to find negligence by a preponderance of the evidence. So, even if the court were technically wrong in saying this to the jury, no prejudice resulted from it.

It is said that the court erred in not giving after the general charge, an instruction which was asked by the plaintiff in error. I will not stop to read it. It is enough to say that the court had sufficiently covered the point in the general charge, and especially in a sort of a conversation which arose between the judge and counsel who is now criticizing the action of the court in refusing to give the instruction finally asked. We think that the court did not err in refusing it.

Some suggestion was made in the argument, in the discussion of the claimed negligence of the defendant power company

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as to the rule which will apply when a dangerous current of electricity is permitted to escape from the wire of the company which should control it. The courts of the different states are not altogether in harmony upon this question. In one or more the rule has been adopted that a conclusive presumption of negligence arises in such a case. In other words, that it is negligence *per se* to permit the current to escape. In other jurisdictions it has been held that while no such conclusive presumption arises, the burden shifts and that it becomes incumbent upon the company which permits the escape of the electric current to show that it was not negligent. In the Marsh case, to which I have referred, this question was fully considered. The authorities had been marshaled and examined, and in the consideration which I gave to the case in the court below, I concluded that the general rule should not be departed from and an exception introduced into our jurisprudence, and, therefore, I held that the burden still rested upon the plaintiff to show the negligence of the defendant; that while the defendant under such circumstances may be held to a high degree of care, that it is still but ordinary care under the circumstances commensurate to the dangers to be apprehended, and the burden does not shift. The circuit court, as I have said, affirmed the conclusion of the trial court in this as in other respects, and that point was especially discussed by Judge Winch, who sat in the circuit court in my stead and delivered the opinion.

No complaint is made as to the amount of the verdict in this case, and a search of the record fails to disclose any other matter in which the plaintiff in error has been prejudiced by any claimed errors. We think that the judgment of the court below should be affirmed.

Smith & Baker and *W. H. McLellan*, for plaintiff in error.

C. A. Thatcher, for defendant in error.

LIABILITY FOR DEATH OF LINEMAN FROM ELECTRIC SHOCK.

[Circuit Court of Hamilton County.]

**THE CITY & SUBURBAN TELEGRAPH ASSOCIATION V. NELLIE KELLY,
ADMINISTRATRIX.**

Decided, July 7, 1906.

Electric Wires—Negligence of Company Using Uninsulated Wires—Contributory Negligence of Lineman—Pleading—Evidence.

1. In an action against an electrical company for damages on account of the death of a lineman from a shock received while stringing an uninsulated wire, which came in contact with a highly charged and uninsulated wire of another company, the defendant is not entitled to a directed verdict in its favor on the ground that an employe of ordinary prudence would not have undertaken to do the work which the decedent was ordered to perform, and should have known that the wire of the second company was charged with a dangerous current and the wire he was handling might come in contact with it.
2. But in such a case it is error to admit testimony regarding the use of rubber gloves as a means of avoiding danger while stringing wires, where there is no specific allegation that the defendant was negligent in failing to provide the intestate with rubber gloves, and there is no general allegation opening the door to such evidence.

GIFFEN, J.; JELKE, J., and SWING, J., concur.

The plaintiff in her amended petition avers that Patrick Kelly, deceased, was in the employment of the defendant company in the capacity of lineman; that while thus employed he was assisting in stringing wires in the city of Cincinnati under instructions of the defendant company, and without fault on his part was instantly killed by an electric shock which passed through a wire which he was in the act of stringing upon the company's poles. The negligence, as finally averred, is as follows:

“Said defendant company was guilty of gross negligence, in that it knowingly undertook to, and did string said wire which was not insulated, in close proximity to the wires of the Miami & Erie Canal Trolley Company, which were uninsulated and dangerous, being heavily charged with electricity, all of which

was known by the defendant company, its officers and managers and not known to plaintiff's intestate."

The defendant by answer admits that plaintiff's intestate was in its employ in the capacity of a lineman; that he met his death from an electrical shock while in the performance of his duty, but denies that he was unaware of the dangerous character of the work which he was employed to perform, and avers that the injuries causing his death were sustained without negligence on the part of the defendant company, and were the result of the negligence and want of care of plaintiff's intestate or of his fellow-servant engaged in the work with him; and that the risk of all such injuries was assumed by said intestate; and denies each and every other allegation in plaintiff's amended petition.

On trial, the jury returned a verdict in favor of the plaintiff.

The first alleged error is the overruling of the motion of the defendant at the conclusion of plaintiff's evidence to instruct the jury to return a verdict for the defendant. While the plaintiff offered in chief no direct evidence of the knowledge of the defendant that the Miami & Erie wires were charged with electricity and therefore dangerous, yet the circumstances were such that by the exercise of ordinary care, it might and would have known of such condition and danger. It is claimed, however, that the danger was obvious to the intestate and that he therefore assumed the risk.

We think the case is governed by the principle announced in the case of *The Van Duzen Gas & Gasoline Engine Company v. Schelies*, 61 O. S., 298, the syllabus being as follows:

"1. A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master; such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident.

"2. One who, as a servant, does that in his employment which he is ordered to do by his master, and is injured by the culpable negligence of the latter, is not deprived of a right to recover for the injury by the fact that it was apparently dangerous, if a person of ordinary prudence would, under the circumstances,

have obeyed the order, provided he used ordinary care in obeying it.

“3. In such case the question is one of fact for the jury under proper instructions from the court.”

Although it was apparent that the M. & E. wires were erected for the purpose of conveying electricity, it was not apparent to the linemen engaged in the work that such wires were at that time heavily charged with electricity, nor was it apparent that the wire being strung would come in contact with the M. & E. wire. It seems, therefore, that a person of ordinary prudence would, under the circumstances, have obeyed the order to perform the work as directed. The motion was properly overruled.

The objection to the charge of the court upon the subject of assumed risk is not well founded, as the charge was even more favorable to the defendant than would seem to be warranted by the case above cited.

Another alleged error is the admission of testimony concerning the use of rubber gloves as a means of avoiding danger in stringing wires. There is no specific allegation in the amended petition that the defendant was negligent in failing to provide the intestate with rubber gloves, nor is there any general allegation which would warrant the admission of evidence of this character. It will be observed that the allegation of the amended petition is not that the act complained of was done in a negligent and careless manner, but that the act done as averred in the petition constituted negligence. There is no averment that the act was done without providing adequate means to protect the intestate, but that there was a failure to insulate the wire being strung. Upon the trial, the evidence should be confined to the acts of negligence so specifically and definitely averred in the petition, and we think the court erred in receiving the testimony complained of, for which the judgment will be reversed, and cause remanded for a new trial.

Outcalt & Foraker, for plaintiff in error.

D. D. Woodmansee, contra.

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**LIABILITY FOR LOSS OF HOGS NOT DRENCHED IN
TRANSIT.**

[Circuit Court of Wood County.]

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY
v. JAMES GIBSON.

Decided, January 12, 1906.

*Railways—Liability of, for Negligence—Can not be Limited by Custom
or Contract—Evidence—As to Overcrowding of Car—Loaded with
Hogs and Sheep—Failure to Cool Hogs in Transit by Sprinkling.*

1. In casting upon a railway company the burden of a common carrier the law prescribes what it shall do, and the responsibility thereby assumed by the company can not be limited by any custom which it may itself establish or even by special contract, where the claim made against it is based on negligence.
2. It therefore follows, in an action for recovery for the loss of hogs in transit, the allegation being that the hogs died from the heat by reason of failure to drench them properly, that the railway company can not absolve itself from liability by showing it was not its practice to throw water on hogs in the night time or at all unless so ordered by the shipper.

HAYNES, J. (orally): PARKER, J., and WILDMAN, J., concur.

James Gibson brought in the court of common pleas an action against the Lake Shore & Michigan Southern Railway Company to recover for the loss of certain hogs shipped from Luckey, this county, to Buffalo, N. Y. The shipment took place on the 4th of August, 1900, and it is claimed on behalf of the plaintiff that the hogs died by reason of the railroad company failing to properly drench the hogs, as it is termed; that is to say, from time to time during the day to spray them with water to keep them cool; and the allegations in the petition are that the defendant failed in that respect and it is, therefore, liable for the loss of the hogs.

The defendant denies the allegation of the petition in that respect and sets up by way of defense that there was a special contract, but upon the trial of the case the testimony was that the special contract had never been delivered or accepted by Gibson, and the court ruled it out, so that it is not before us.

The case was tried upon the issue made in the pleadings in regard to the matter of spraying or drenching. The hogs, it appears, were loaded in the afternoon into a car at Luckey and were sent to Toledo over the Ohio Central railroad, arriving there in the evening, and were picked up about eight o'clock, or such a matter, by the Lake Shore railroad and taken to Buffalo, where they arrived twelve or fourteen hours later.

It is claimed, and evidence is offered tending to show, that the hogs when they were placed in the car by the plaintiff below, were overcrowded, that is, the cars were overloaded when the hogs were put in, and that was largely the cause of the death of the hogs; the hogs becoming overheated and scrambling, pushing and crowding each other in the car in their efforts to get air and rest. And it is urged that that is a matter of contributory negligence for which the plaintiff below should be responsible, and should exonerate the company.

Perhaps it is well enough at this point to cite a case decided by the Supreme Court of Ohio, the case of *The Union Express Company v. Graham*, 26 Ohio St., 595. There, there had been a shipment from Cleveland to Ravenna of a certain article of furniture that had been done up, not in a very careful manner, in fact done up in wrapping paper when it should have been boxed, and the court found that it could have still have been carried by the express company, if they had used extraordinary care and diligence. Judge White on page 598 said:

“It is settled by a series of decisions in this state that a common carrier can not, by stipulation with his employer, exempt himself from liability for loss or damage occasioned by his own negligence or that of his servants.”

That general rule does not apply here because there was no special contract as alleged, for it is ruled out. In the case cited, when the article of furniture came to the express office it was found it was not properly packed, and the express company refused to receive it except at “owner’s risk,” and it is claimed that was agreed to. The court in the opinion say:

“The present case is sought to be withdrawn from the operation of these rules by the fact that the property in question was not properly packed when delivered to the carrier; and it is

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claimed that, under the circumstances, the carrier is to be regarded as a mere bailee for hire. We do not assent to this view. The plaintiff in error, while engaged in the business of a common carrier, could not by agreement divest itself of that character. The only effect of the agreement was to relieve it from the liabilities imposed by the common law on public carriers where there was no fault or neglect on the part of the carrier.

“The carrier may well refuse to receive property, unless it is properly packed. But if he receives it the duty attaches of exercising due care for its safe carriage. If, notwithstanding such care, the property should be damaged through the defective packing of the owner, the carrier would be relieved from liability. But where, as in this case, the carrier takes charge of the property for the purpose of carriage, the duty rests on him to show that the injury is attributable to the defective packing and not to any fault or neglect on his part. This the plaintiff in error failed to show.”

There is no special agreement in this case. The bill of lading is here, and it is a general bill of lading. In the trial of the case, testimony was offered on the part of the plaintiff as to the condition of the hogs, and the condition of the weather, and especially the condition of the hogs late in the day that they were taken. The testimony shows at the time the hogs were taken, two of them appeared to be affected by the heat. Nevertheless, the railroad company received these hogs and forwarded them. There is testimony tending to show that the railroad company has made provision for the drenching or spraying of stock at different points along the line of the road by means of a hose attached to water pipes at places where they take water, that the water is turned into the cars and thus drenches the hogs. The plaintiff proceeded to show this fact, and further showed that it was the custom of the railroad company to sprinkle the stock; that they were sprinkled at different points along the railroad.

The railroad company, when it came to its side of the case, offered testimony tending to show that the hogs were overpacked or overcrowded in the loading; that is, that certain hogs were put in a car with a number of sheep, and this packed the hogs too closely together and subjected them to injury by heat. There is testimony on the part of the plaintiff in rebuttal, tending to show that they were not improperly packed. The defendant

desired to show that it was the custom and practice of the railroad company not to sprinkle hogs during the night season, and also testimony regarding their habit during the day not to sprinkle them unless it was ordered by the shipper, and some of that testimony was refused by the court.

Some testimony was allowed to be given, however, in regard to the effect of sprinkling sheep, and in regard to the effect of sprinkling when hogs were packed in with sheep; it being claimed it was dangerous to sheep to sprinkle them with water when on the road because they would catch cold and become less marketable.

These are called customs, and to the extent that they are in the course of business, the testimony offered by the plaintiff, we think, was admissible, but we are unable to see that the court erred in refusing the testimony of the defendant. The effect of the testimony would be to limit the liability of the railroad company by its own customs. It could not do that. The law casts upon the railroad company the burden of common carriers and says what it shall do and it can not limit it by any custom they may undertake to establish themselves. They can not do it even by special contract if it is caused by negligence.

We understand the rule of the Supreme Court is that when they received those hogs they were bound to use due care in the transportation of the hogs in protecting them from injury although they were overpacked in the cars. Testimony was offered tending to show by some witnesses that they were overpacked, and that the packing resulted in the death of some of these hogs. Testimony was also offered tending to show that the air moving through the cars, when they were in motion, would be sufficient to cool the hogs. All of that testimony the court admitted, and so far as we can observe, the court also excluded the class of testimony which would tend to show a custom that would absolve the railroad company from liability and which, as I have stated, they are not permitted to do.

We think that the court made a fair statement of the case and a fair charge to the jury of the law of the case. We think that there was not sufficient care on the part of the agents of the railroad company during the day in regard to the sprinkling of

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these hogs; we think that it might have been done with a little care, without injury to the sheep. We are, therefore, disposed to allow the verdict of the jury to stand in the court of common pleas and the judgment will be affirmed without penalty.

E. D. Potter and *James O. Troup*, for plaintiff in error.

Ed. Beverstock, for defendant in error.

PARTIES TO AN ACTION ON A GAMBLING DEBT.

[Circuit Court of Cuyahoga County.]

ELLA M. PENTZ V. GEORGE H. BURROWS, AS ASSIGNEE, ETC.

Decided, January 19, 1906.

Gambling—Action to Recover Money Lost—Proper Parties—Joinder of Property Owner, Principal and Assignee of Principal—Primary Right, Remedial Right and Remedy—Statutes Relating to Gambling, Parties and Causes of Action—Pleading.

In an action for recovery of money lost in gambling, the principal to whom the money was lost, the assignee of the principal, and the owner of the property may be properly joined.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

The parties here are as they were below. Suit was brought by the plaintiff against Frederick J. Johnson and others, as partners under the firm name of Johnson, Walther & Co., George B. Burrows, as assignee of said firm, and Levi T. Schofield.

The petition alleges that Johnson, Walther & Co. carried on a gambling business in rooms owned and leased to them by said Schofield, and that said business was so carried on with the full knowledge of said Schofield, who took no steps to recover the premises from said firm; that the plaintiff lost in gambling at said gambling rooms and paid to said firm on account of such loss in gambling the sum of \$482.50; that after said loss and payment by her said Johnson, Walther & Co. made an assignment for the benefit of their creditors to said Burrows; that she presented a claim for the money by her lost as aforesaid to said assignee for allowance, and such claim was rejected by him. She

prays for judgment against all the defendants for said sum of \$482.50, and that the defendant Burrows be ordered as assignee as aforesaid to allow her claim as valid.

To this petition Burrows filed a demurrer, which was sustained, and the plaintiff, not desiring to amend or plead further against him, final judgment was rendered in his favor. The grounds of demurrer are stated in these words:

“First. There is a misjoinder of parties defendant.

“Second. That separate causes of action against several defendants are improperly joined.

“Third. That the petition does not state facts sufficient to constitute a cause of action against this defendant and in favor of this plaintiff.”

Recovery is sought against Johnson, Walther & Co. under provisions of Section 4270, Revised Statutes, which reads:

“If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays or delivers the same, or any part thereof, to the winner, the person who so loses and pays, or delivers may, at any time within six months next after such loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof, from the winner thereof, with costs of suit, by civil action founded on this chapter, before any court of competent jurisdiction.”

Recovery is sought against Schofield under provision of Section 4276, Revised Statutes, which reads:

“Whenever premises are occupied for gaming or lottery purposes, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action, or by action of forcible detainer before a justice of the peace; and if any person lease premises for gaming or lottery purposes, or knowingly permits them to be used and occupied for such purposes, and fail immediately to prosecute, in good faith, an action for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in carrying on the business of gaming, or a lottery, in such building.”

The order for allowance of the claim by Burrows is sought under the provisions of Section 6352, Revised Statutes, allowing suit to be brought on claim rejected by assignee, within thirty

days of such rejection, the judgment, when claim is found upon trial to be valid, to be that the same be allowed by the assignee.

It is not urged here, and could not successfully be urged, that this petition does not state sufficient facts to entitle the plaintiff to a judgment against the assignee.

Was there, then, a misjoinder of causes, or a misjoinder of defendants?

Section 5058, Revised Statutes, provides that, "the plaintiff may unite several causes of action in the same petition * * * when the same are the same transaction or are transactions connected with the same subject of action."

By Section 5059, Revised Statutes, it is provided that "the causes of action so united * * * must affect all the parties to the action."

By Mr. Justice Ingraham, in the case of *Robinson v. Flint*, 16 Howard's Practice, 243, this language is used:

"By transaction I understand the whole proceedings, commencing with the negotiation and ending with the performance of the contract, where the matter in controversy arises out of a contract, and I see no difficulty in carrying out under the present system of pleading, what is the fair meaning of the words used in the 167th Section. The answer is only to be a statement of facts showing that upon each count the plaintiff has no right to recover. The judgment, if on both claims, would only be for so much money, and there is no difficulty now in entering up judgment as formerly, even if the causes are in tort and contract. The only point upon which there would be doubt as to the proper proceeding, might be as to the execution. In one case (tort) it might be against the person, in the other against the property. The answer to this is, if the plaintiff thus unites claims, he loses his right to proceed against the body, and must be content with the other execution." See, also, *Howe v. Peckham*, 10 Barber, 656, and *Badger v. Benedict*, 4 Abbott's Practice, 176.

The wrong for which plaintiff in this action seeks a remedy is the loss by her, in gambling, and payment of the money so lost, to Johnson, Walther & Co. Everything depends on this and the liability of each defendant is connected with this subject of action. Failure to establish this transaction on her part will prevent a recovery against any one of the defendants. If she recovers against all, she will have a joint judgment against John-

son, Walther & Co. and Schofield, because if the allegations of her petition are true, Schofield is, by Section 4276, Revised Statutes, made a principal with Johnson, Walther & Co. Her judgment against Burrows will be of a different character, but it arises out of the same transaction, viz., the gambling loss to Johnson, Walther & Co.

The right against Burrows is different from that against the others, but the cause is the same. In Pomeroy's Code Remedies, Sec. 454 (4th Ed.), it is said:

"The cause of action thus defined is plainly different from the remedial right, and from the remedy or relief itself. The remedial right is the consequence, the secondary right, which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right. From one cause of action, that is, from one primary right and one delict being a breach thereof, it is possible, and not at all uncommon, that two or more remedial rights may arise, and therefore two or more different kinds of relief answering to the separate remedial rights."

See, also, Section 455.

Do the causes of action affect all the parties defendant as required by Section 5059, Revised Statutes? Certainly, all are affected by the transaction out of which all the rights of the plaintiff arise. All are not affected in the same manner, but this is not necessary. See Pomeroy's Code Remedies, Section 480, old Section 374.

The Ohio authorities cited by counsel have not been here discussed for want of time and because they are familiar to counsel in the case. It is believed that none of them conflict, when carefully considered, with the views herein expressed.

Our conclusion is that the court erred in sustaining the demurrer of Burrows and rendering judgment in his favor, and the same is reversed and the case remanded to the court of common pleas.

H. M. Bull and *W. C. Rogers*, for plaintiff in error.

Geo. H. Burrows, for defendant in error.

FAILURE OF FIREMAN TO SIGNAL AT GRADE CROSSING.

[Circuit Court of Hamilton County.]

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY V.
LIPMAN LEVY, ADMINISTRATOR DE BONIS NON OF THE
ESTATE OF FLORENCE S. TAYLOR, DECEASED.

Decided, January 13, 1906.

Negligence—At a Railway Crossing at Grade—Looking and Listening without Stopping—Failure of Flagman to Signal Danger—Questions for the Jury—Expectation of Life of Man and Wife.

1. A traveler is never wholly absolved from using his faculties to avoid danger, and in an action growing out of an accident at a grade crossing, a charge to the jury is erroneous which makes the railroad company liable on account of the negligence of the watchman in failing to signal danger, independent of the fact that the decedent and her husband, who was riding with her, depended on the watchman more than on their own faculties to discover whether a train was coming.
2. In such a case the extent to which the decedent and her husband used their senses to discover whether a train was approaching, or the degree of negligence, if any, of which they were guilty, are questions for the jury.
3. While it is true that the burden of proving contributory negligence is on the defendant, an exception arises to the rule where the plaintiff's own testimony raises a presumption of contributory negligence.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

This action arose from an accident that occurred at a railroad crossing where a flagman was maintained. Dr. Taylor, the husband of the deceased, testified that he had frequently observed a flagman seated in his box when no train was approaching the crossing; that on the occasion of the accident, he saw no flagman on the track; that the door of the flagman's box faced the east; that he approached the track from the west, his horse moving on a slow trot; that his view of the track in the direction from which the train was running was obstructed.

The jury returned a verdict in favor of the plaintiff for the sum of \$3,500, which the court reduced to the sum of \$3,000, and rendered judgment therefor.

It is claimed that the court erred in overruling the motion to arrest the case from the jury at the conclusion of plaintiff's testimony. In the case of *The Cincinnati, Hamilton & Dayton Railway Company v. Walter F. Taylor*, growing out of the same accident, this court held upon a like motion that the court properly overruled a similar motion. The evidence in this case is substantially the same, and a like ruling will be made in this case.

It is further claimed that the court erred in giving the following instruction in its general charge:

"If the flagman was absent from his place of duty, or was not giving any signal or warning when she attempted to pass over the crossing, it is not contributory negligence on her part to drive through without stopping to look or listen, though the view is obstructed, in order that the cars could have been seen a few feet away."

It will be observed that the decedent was not relieved by this charge of the duty of looking and listening only of the duty of stopping for that purpose. It is not entirely clear what is meant by "the absence of the flagman from his place of duty," but inasmuch as the testimony discloses that the flagman was in the box at the side of the crossing, it must be inferred that the court intended to state only if the flagman was not on the crossing or not visible, so that any signal given by him could be seen by the decedent or her husband. Applying the charge to the evidence in the case, there is no error in giving it. See the case of *Railroad v. Schneider*, 45 O. S., 678.

The following paragraph in the general charge is also claimed to be erroneous:

"If you find from a preponderance of the evidence that the decedent knew there was a flagman at this crossing, that he was absent from his place of duty upon this occasion, or failed to give the signal of danger, and she had no other knowledge of the danger, the railroad company would be liable providing you find from the evidence the collision was the proximate cause of her death."

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This charge makes the railroad company liable for the negligence of the flagman provided the decedent knew that a flagman was maintained at this crossing, and had no other knowledge of the danger, independent of whether she or her husband looked or listened for an approaching train. In the former case we said:

“A traveler is never wholly absolved from using his faculties to avoid danger, and what would or would not amount to the exercise of ordinary care depends upon the circumstances of each case, and is properly one of fact to be determined by the jury.”

In the case of *Tyler v. Old Colony Railroad*, 157 Mass., 336, the last proposition of the syllabus is as follows:

“If it is customary for a railroad corporation to have a flagman at a crossing at grade of a highway by the railroad, and he is absent, this does not excuse a traveler on the highway from looking to see if a train is coming before he attempts to cross the railroad tracks, where there is no obstacle to prevent his seeing.”

And on page 340, the court say:

“If it is customary to have one (flagman) at a crossing, and he is absent, a traveler has a right to rely to some extent on this fact; but this does not excuse his not looking at all to see if a train is coming, when there are no obstacles to prevent his seeing if he looks.”

In the case of *Cadwallader v. The Louisville, New Albany & Chicago Railway Company*, 128 Ind., 518, the syllabus is as follows:

“One who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured, although the crossing was supplied with a flagman, and the flagman did not give notice of the approach of danger. A person attempting to cross should not have the right to assume, from that circumstance, that no danger existed, and enter upon the railroad track without looking. Had the flagman done anything to induce the appellant to attempt the crossing at the time she was hurt, or anything to throw her off

her guard, then the question of her negligence would have been a question for the jury.”

It does not appear from the testimony that the doctor or his wife wholly failed to use their senses to ascertain whether a train was approaching. The extent to which they did use them, or the degree of negligence, if any, in not using them, were questions for the jury which were excluded by that part of the general charge last quoted. It seems, therefore, that the charge was clearly erroneous and prejudicial.

The court also charged that the burden of proving contributory negligence is on the defendant. While this is true ordinarily, it is not so when the plaintiff's own testimony raises the presumption of contributory negligence. We think in this case the court should have qualified the charge in this respect. The evidence was sufficient to show that death resulted from the accident.

It is also claimed that the testimony of the actuary pertained to the expectation of Doctor Taylor's life alone, whereas the joint expectation of the doctor and his wife must control. It appears, however, from the bill of exceptions, at page 51, that the actuary did give the expectation of the joint lives of a woman 45 years old and a man 84 years old. We think the doctor was qualified to testify as to the value of his wife's services, although we may not agree with him in the amount fixed, nor were the jury bound by it.

We are not disposed to disturb the judgment upon the ground that the damages are excessive, although it is not free from doubt.

Judgment reversed, and cause remanded for a new trial.

Morison R. Waite, for plaintiff in error.

Johnson & Levy, for defendant in error.

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**PUNISHING COUNSEL FOR CONTEMPT IN THE PERFORMANCE
OF A PROFESSIONAL DUTY.**

[Circuit Court of Lucas County.]

THOMAS H. TRACY ET AL V. THE STATE OF OHIO.

Decided, July 21, 1906.

Contempt—Attorney and Client—Professional Ethics—Reduction of Sentence—Discretion of Court—Duty of Counsel Toward a Client Unjustly Punished—Good Faith Sufficient Ground for Action—Personal Knowledge of Trial Judge as to Falsity of Charges Immaterial—Proper Procedure—Necessary Findings in Support of Judgment for Contempt.

1. Inasmuch as a court has discretion to revise, increase or diminish a sentence during term and before it has gone into operation, it follows that attorneys representing one under sentence have the right to invoke the exercise of this power, and this may properly be done by motion.
2. Charges affecting the court may be strictly or substantially true and yet involve the one making them in contempt, if they are not made in due course of procedure and for legitimate and justifiable ends.
3. There is, however, not only justification in such a course, but counsel would be recreant to their sworn duty as officers of the court if they did not urge, in proper language and spirit, the vacation of a sentence which, in their honest belief, is excessive, and was based on a plea of guilty improperly obtained, and pronounced by a judge actuated by improper motives.
4. Counsel so acting in entire good faith can not be subjected to proceedings in contempt, notwithstanding the charges they put forth prove ill-founded, and were false to the personal knowledge of the judge at the time of the filing.
5. Nor will a judgment stand for contempt against attorneys, based upon their manner of performing a professional duty, unless there is a statement or finding in the journal entry or bill of exceptions, setting forth that the said attorneys knew or had reason to believe their charges were unfounded, or that they acted in bad faith in presenting them.

WILDMAN J.; HAYNES, J., and PARKER, J., concur.

In approaching the consideration of the important questions raised by the unfortunate controversy which has found its way

to this court, we may perhaps clarify the atmosphere to some extent by the enunciation of a few general principles which we believe to be thoroughly grounded in justice and good sense and amply sustained by judicial authority.

1st. The trial court had judicial discretion after sentence and at the same term to revise and modify the penalties imposed on the original defendants convicted under the anti-trust law. This rule is established beyond controversy by the case of *Lee v. The State of Ohio*, 32 O. S., page 113, as we read in the first paragraph of the syllabus:

“Where a court, in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into operation or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.”

The judge rendering the opinion says, on page 116:

“The refusal of the court to allow the defendant to withdraw his plea of guilty, and again plead not guilty, rested in the sound discretion of the court.”

We need not fortify this position, for it was substantially conceded in argument by attorneys for the state that the court below had discretion to do these things. In view of these adjudications and concessions in argument, it is, in our judgment, at present unnecessary to consider the applicability of the statutory grounds for new trial after conviction. The court recognized its discretionary power, with or without express statute, by revising and modifying the sentences after they were made and before the motions claimed to be contemptuous were filed.

2d. If the court had such discretionary power it could entertain and consider a motion invoking it.

3d. Attorneys for the defendants below, recognizing such discretionary power in the court after the sentence had a right to invoke the exercise of that power.

4th. The natural, proper and regular way to invoke it was by *motion* addressed to the court.

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5th. Charges that are strictly or substantially true may involve the person making them in contempt if they are not made in due course of procedure for legitimate and justifiable ends. Many of the cases cited to us are of this character, and therefore give us no aid here.

In elaboration of these principles as to the power of the court and the rights and duties of counsel, we are clearly of opinion that the latter had no right to file motions containing indecent, profane, insulting or contemptuous expressions; but that they had the right, and it was their duty as attorneys under the oaths which they had taken, to urge all matters of fact and law which in their honest judgment ought to weigh with the court and induce the granting of the motions. If among those matters were honest claims, well or ill founded, that the statute under which the indictments were had was unconstitutional; that the pleas of guilty were improperly obtained; that the sentences were excessive; or that the judge in the imposition of the sentences had been actuated by improper motives, counsel would have been recreant in their sworn duty as officers of the court if they had refrained from presenting those claims. The principle is not different from that governing the filing of affidavits that judges are prejudiced, or that upon the trial the judge has committed errors or irregularities. In every such instance it may be said that there is some imputation upon either the fairness or intelligence of the judge. But the filing of the affidavit or motion is not, if offered in good faith, insulting or contemptuous. It is an appeal, rather, to the assumed desire of every just and upright judge as promptly as possible to undo a wrong.

Any knowledge possessed by the judge as to the truth or falsity of the statements, or, more precisely, the correctness of the claims of counsel, does not meet the question. It is not the knowledge of the judge, but the good or bad faith of the attorneys, that is vital to the question whether there was or was not contempt. It is the conduct of the attorneys that is under inquiry and the spirit and intent with which they did the act are involved.

This court has heretofore, in the case of *Hunt v. The State*, 5 C. C.—N. S., 621 (638), expressed its views as to the current of authority on this precise matter, in the following words:

“The authorities give many illustrations of what are and what are not acts of contempt, and they are not in entire harmony, but so far as we have been able to examine, where one is pursuing in an orderly and decent way and in good faith, what he supposes to be his right in a court of justice, he is not guilty of contempt though he falls into error and violates the rules of court and even statutes (not penal) without number; but to constitute contempt in such case, there must be something in the manner of doing the thing, or something in the circumstances under which it is done, that it must be disrespectful to the court, or a hindrance to the administration of the affairs of the court, and the act must be done willfully and for an illegitimate or improper purpose.”

The affirmation of this decision by the Supreme Court (72 O. S., 643), without report, may perhaps be deemed at least a tacit approval of his view.

The Supreme Court of the United States in *In re Watts*, 190 U. S., 1, adds the weight of its high authority:

“The preservation of the independence of the bar is vital to the due administration of justice, and its members can not be imprisoned for contempt for error in judgment when advising in good faith and in the honest belief that their advice is well founded.”

Coming to the question of whether counsel acted in good or bad faith in the matter under inquiry, we may properly again refer to the opinion heretofore expressed in the *Hunt* contempt case, *supra*, page 643:

“It is a *quasi*-criminal proceeding. The presumptions are all in favor of the person charged with the offense, *i. e.*, in favor of innocence. It is not a case of the character where a court reviewing the conviction is to assume, in the absence of evidence to the contrary, that the action of a tribunal below was correct and lawful. It is a case where the guilt of the person convicted must appear affirmatively in the record.”

In the case of *Springer v. Avondale*, 35 O. S., 620, the Supreme Court held that a judgment based on finding of fact is

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erroneous, unless the facts found are sufficient in law to warrant the judgment.

Referring to the record before us, there is a very clear and positive statement of the grounds on which the trial judge adjudged the attorneys guilty of contempt; but there is no statement or finding in the journal entries or bills of exceptions: (1) That the attorneys knew or had reason to believe that the claims made in the motions were unfounded; or, (2) That they acted in bad faith in filing and presenting them. Without such findings or a recital of some evidence to show such facts, the guilt of the plaintiffs in error is not apparent.

Counsel for the state, while conceding that the motions as to some of the claims embodied were altogether legitimate and proper, argue that they became contemptuous because of the embodying of charges that the judge permitted improper influences or purposes to enter into the measuring and fixing of the penalties on the defendants. We are not at present concerned with the actual motives of the judge. It is sufficient to justify the incorporation of these matters in the motions, if the attorneys framing the motions believed them to be proper grounds for orders vacating the sentences. They were entirely pertinent to the application for such orders.

It is urged that certain of the matter set forth in the motions respecting the motives and purposes of the judge in imposing the sentences, *i. e.*, to compel the convicted ice dealers to return to their customers all they may have exacted in excess of what the judge deemed a fair price for the ice sold; to compel them to reduce their prices to a scale that the judge might deem fair and reasonable, and like purposes, is clearly contemptuous because it imputes to the judge corrupt and sinister motives and designs.

Fairness to the judge as well as to the attorneys requires an application of these cases of the usual rule that the language shall not be subjected to a strained construction in order to make it contemptuous, but that, on the other hand, if it is fairly open to a construction that makes it inoffensive or less offensive, it should receive that construction.

While we hold that the conviction can not stand because of the absence of finding or evidence of bad faith, and therefore need not enter into any task of construction to justify our judgment, still we deem it proper to remark that it seems to us that a judge might attempt to attain to the full measure of justice on behalf of all concerned or affected by compelling a restitution by an offender of the illegitimate profits of his wrongdoing, and a cessation of such wrongdoing, and that such attempt might be prompted by most praiseworthy motives, and need not involve any wrong intent, even if it should turn out that the judge erred in that he overstepped his authority in the premises. We do not discover, either in the substance or form of what is set forth in the motions in this regard, anything to justify the claim that the judge was charged with corrupt or sinister designs in thus attempting to accomplish the ends of justice for all concerned. True the motions charge that the judge acted upon insufficient data, and without lawful warrant, but that does not necessarily imply more than that he erred or blundered. Whether this phase of his action is fairly open to this criticism can not be determined until all the facts of the transaction are properly brought before us and carefully scrutinized and tested by the law. What we desire to express upon this point now is simply that it is not fair to any of the persons concerned to extract the harshest tone and the bitterest flavor possible from these charges.

It is said that the purposes of the judge were not susceptible of proof and that therefore it was an impertinence to assert the claims in that regard. Whether or not in support of the assertions evidence would have been competent, is a question which we need not stop to consider. A question of law as to such competency might properly be made by the motions, if made in good faith and in phraseology not offensive in any other way than as any legal charge of error, irregularity or misconduct may offend. If evidence could be properly offered in support of those claims the kind of evidence so admissible would perhaps not essentially differ from that with which courts and lawyers are familiar in like cases. Intent is to be determined from

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words and conduct or other circumstances throwing light on mental action.

We should not lose sight of the fact that in the whole inquiry are involved primarily and in the most important degree the rights of prisoners on whose behalf motions are presented.

If attorneys are punishable for preparing and filing such motions on the ground that such conduct is contempt *per se*, it follows that their clients willfully participating therein are likewise punishable for preferring such petitions to a court either personally or through the agency of attorneys; that to thus invoke the aid of a court in behalf of their liberties they still further imperil their liberty; that their petitions may be brushed aside without ceremony and they punished summarily by fine or imprisonment, or both, for having presumed to sue for what they may have conceived to be justice and their rights.

The contention of counsel for the state logically resolves itself into this: that no matter how flagrant and corrupt may be the action asserted to have been committed by a judge, not only is the litigant against whom the wrong is alleged to have been perpetrated without remedy (for the road to the higher courts is not open to him unless he first give the trial judge an opportunity to undo his own wrong), but in his appeal for such justice he is, in the words of the last of the Roman peoples' tribunes, "answered by the lash."

Whether the contempt alleged here to have been committed is of a kind described in Section 5639 of the Revised Statutes, to be proceeded against without written charges or hearing and punished summarily (as was done in this case), or of a kind described in Section 5640 of the Revised Statutes, as "Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions," requiring written charges and hearing, as provided in Section 5641, we deem it unnecessary to inquire. But finding that the convictions are not sustained by evidence or finding that the defendants acted in bad faith and are therefore contrary to law, and that there are no charges formulated or written as a basis of the prosecutions, so that nothing would be pending to be remanded upon

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reversal, we therefore reverse the judgments, dismiss the proceedings, and order that the defendants be discharged.

In the foregoing reasonings and conclusions, we have endeavored to intimate no views not essential to the inquiry in the contempt proceeding, and our opinion and judgment must not be construed as any reflection upon the motives or conduct of the judge below, or intimation of irregularity, or error, further than as herein expressed.

King & Tracy, Brown, Geddes, Schmeltau & Williams, Smith & Beckwith, and Hamilton & Kirby, for plaintiffs in error.

L. W. Wachenheimer, Prosecuting Attorney, *C. A. Sciders, Ralph Emery*, Assistant Prosecuting Attorney, and *C. H. Masters*, for defendant in error.

COUNTY AND TOWNSHIP DITCHES.

[Circuit Court of Fayette County.]

CHARLES SOLLARS ET AL V. MARY A. SEVER ET AL AND CHARLES
SOLLARS ET AL V. WILLIAM GING ET AL.

Decided, June, 1906.

Ditches and Water-courses—Location of County Ditch in a Township Ditch—Jurisdiction Acquired by County Commissioners, How—Alteration or Reconstruction of Ditch—Appeal to Probate Court—Error to the Common Pleas—Dismissal of Petition—Costs.

County commissioners are without authority to locate and establish a ditch in a township ditch until there has been a refusal by the township trustees to act, as provided in Section 4510.

SULLIVAN, J.; WILSON, J., and DUSTIN, J., concur.

Where a township ditch has been located, established and constructed by township trustees as provided by law, the commissioners of the county in which said ditch is located can not acquire jurisdiction under Section 4447, Revised Statutes, upon the petition of the owner of any lot or tract of land abutting

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upon, and benefited by, said improvement, to straighten, widen, alter, deepen, box or tile said ditch or any portion thereof, until the township trustees of the township in which said ditch has been established and constructed upon a petition filed with them to widen and deepen, etc., have refused to act under Section 4510, Revised Statutes.

If the commissioners act on a petition filed with the auditor, without such refusal be made to appear, all proceedings by them on such petition will be a nullity.

The record in these cases shows that the ditch, for which the petition was filed with the auditor to straighten, widen, etc., is a ditch theretofore located, established, and constructed by township trustees, as provided by law, and that no application was first made to the township trustees, and that they refused to act. The fact that the petition filed with the auditor included laterals and only part of said township ditch does not constitute a new ditch.

Where proceedings are instituted to widen, deepen, etc., any ditch, drain, etc., if to accomplish the purpose of the improvement laterals are necessary, they are a part of the improvement, and therefore when included do not constitute an improvement different from that set forth in the petition.

The county commissioners, therefore, not having acquired jurisdiction over the subject-matter set forth in the petition filed with the auditor, the proceedings had by them were a nullity.

Being a nullity, the probate court acquired no jurisdiction over the subject-matter on appeal, and hence all the proceedings had before said court were a nullity.

The common pleas court in reversing the judgment of the probate court entered a correct judgment, except it should not only have reversed the judgment of the probate court, but set aside the proceedings before the county commissioners, and dismissed the petition filed with the auditor. That court having failed to enter such judgment the judgment of that court is affirmed as to the reversal of the judgment of the probate court, the proceedings before the county commissioners will be set

aside, and the petition filed with the auditor by the petitioners for the improvement dismissed.

If the judgment rendered by the common pleas court includes costs of proceedings before the county commissioners and probate court, that part of its judgment is reversed; with that exception its judgment will be affirmed. The judgment of this court includes only the costs of the proceedings in error in this court and the cause is remanded to the common pleas court to carry the judgment into execution.

Post & Reid and *Creamer & Creamer*, for plaintiffs in error.

H. H. Sanderson and *F. A. Chaffin*, for defendants in error.

EXEMPTION AS TO TAXATION.

[Circuit Court of Cuyahoga County.]

STATE OF OHIO, EX REL J. A. SMITH, TRUSTEE, v. ROBERT WRIGHT,
AUDITOR OF CUYAHOGA COUNTY.

Decided, December 1, 1905.

*Taxation—Deduction for Destroyed Buildings—Mandamus to Compel—
Constitutional Law—Sections 1038a, 1042 and 2731—Abatement of
Taxes.*

Exemption laws having been recognized in Ohio ever since the adoption of the present Constitution, and long before, it has manifestly been the policy of the state to allow certain property to be exempted from taxation; and Section 1038a, relating to deductions from the duplicate for destroyed or injured property, must therefore be upheld as valid and reasonable, notwithstanding the constitutional provision as to the taxing of all property by a uniform rule according to its true value in money.

MARVIN, J. (orally); WINCH, J., and HENRY, J., concur.

This is a proceeding in mandamus brought by Smith, praying that a writ issue from this court commanding and directing the auditor to deduct from a certain tax list a valuation of a certain building which was destroyed after the 2d day of April, 1905. The petition sets out all the facts necessary to entitle the plaintiff

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to this reduction of the tax duplicate as provided in Section 1038a, of the Revised Statutes, if that statute is to govern. The statute is:

“The county auditor shall, whenever, after the first Monday in April, and before the first day of October, in any year, it is made to appear by the oath of the owner, or one of the owners of any building or structure, and by the affidavit of two disinterested persons, resident of the city or township in which such building or structure is, or was situate, that such building or structure has been injured or destroyed by fire, flood, tornado or otherwise, since the second Monday in April of the current year, deduct from the tax list and duplicate the value of such buildings or structures, or such part of the value thereof as shall correspond to the extent of such injury.”

Here the destruction was done by the relator. He tore down and destroyed a building on certain premises between the second Monday in April and the first day in October. The taxes on such building amounted to \$135.68.

It is said that the statute hereinbefore quoted is in violation of Article XII, Section 2, of the Constitution of Ohio, which provides that “laws shall be passed taxing by a uniform rule, all * * * real and personal property according to its true value in money.” It is urged that to permit one to have a deduction by reason of the destruction of the property and covering this period of time from the second Monday in April to the first day of October is to grant a special privilege to one who during that entire six months may have had the benefit and income from such building, and it is said that the fixing of the dates is arbitrary, but Section 2838, Revised Statutes, fixes the date of the lien for taxes as the second Monday in April.

Section 1042 fixes the time for delivering the tax duplicates by the auditor to the treasurer as the first day of October, so that the dates fixed in this statute are fixed evidently because of the time when the lien attaches and the time when the duplicate is to be delivered to the treasurer. Similar provisions are made as to the deduction by the board of equalization of destroyed personal property, by Section 2807, Revised Statutes.

Notwithstanding the provision of the Constitution and the provisions of the statutes, Section 2731 provides that "all property, whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investment in bonds, stocks, or otherwise," etc., "shall be entered on the list of taxable property as prescribed in this title," and provides for the taxation of such property except that which may be specifically exempted.

Exemption laws in reference to taxation have been recognized in Ohio ever since the adoption of the present Constitution, and long before, and yet the provision of the Constitution is that "Laws shall be passed taxing by a uniform rule, all * * * real and personal property according to its true value in money." It is manifest that the policy of this state has been to allow certain property to be exempted.

In the case of *Chisholm v. Shields, Treasurer of Cuyahoga County*, 67 O. S., 374, it was held that a provision by which the widow of Chisholm was to have a large income during the period of her life from the time of his death (a provision by will) that there could be no taxing of that income notwithstanding that it was a very valuable thing.

Cooley on Taxation, page 1376, under the head *Abatement of Taxes*, speaks of the fact that a certain property is exempt from taxation without violating the spirit of the Constitution, which provides that all property shall be taxed.

Is this statute unreasonable? Notwithstanding it would sometimes relieve one from paying taxes on property from which he has had an income during a part of the year, it is not to us so unreasonable as would justify us, in the absence of the holding of any higher court, or any court as far as we know, that the statute is either unreasonable or ambiguous. We do not find it is either. We hold that, therefore, the prayer of the petition should be granted. Judgment will be entered accordingly.

Smith, Taft & Arter, for relator.

Stage, Armstrong & Cannon, for defendant.

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**RECOVERING POSSESSION OF AGRICULTURAL FAIR
GROUNDS.**

[Circuit Court of Lucas County.]

THE TOLEDO EXPOSITION COMPANY V. JOHN W. KERR AND
OTHERS AS THE BOARD OF COUNTY COMMISSIONERS OF
LUCAS COUNTY, OHIO, AND THE LUCAS COUNTY
AGRICULTURAL SOCIETY.

Decided, June 23, 1906.

Actions—For Recovery of Real Estate Under Section 5781—Equitable Features of Action—Pleading—When an Agricultural Society Ceases to Exist—Ejectment by County Commissioners of Tenant of Agricultural Society—Title of Property Purchased by County for Use of Agricultural Society—Grafting a Counter-Claim or Cross-Petition on an Ejectment Suit.

The Lucas County Agricultural Society, having ceased to give fairs on grounds purchased by the county for its use in that manner, granted a license to the Toledo Exposition Company for the use of the lands for the giving of expositions of a prescribed character for a period of twenty years. The Exposition Company in turn ceased to give expositions, and the County Commissioners of Lucas County brought the present action for recovery of the real estate, claiming to be the owner thereof, and alleging that the property is wrongfully held by the Exposition Company, to which was added a cause of action for rents and profits and a prayer for a large amount claimed to be due thereon. *Held:*

1. The action is one for the recovery of real property under Section 5781, notwithstanding there are allegations which seem to call for some form of equitable relief.
2. The Agricultural Society, by ceasing to give fairs, and leasing its grounds to another organization to carry out that purpose, did not fall within the statutory provision that, when such a society is "dissolved or ceases to exist" its real estate and the improvements thereon shall vest in the county. The time fixed by this provision for the lapsing of the rights of the society in the property is when it ceases to exist as a corporation, and not when it ceases to give fairs; and the action of this society did not, therefore, *ipso facto* deprive it of its right of property or the possession and control thereof.
3. The Exposition Company, being a tenant of the Agricultural Society, has a right to defend under the title of that society, and can not be

ousted from the property unless it be made to appear that the Agricultural Society has lost its rights therein, and a judgment against the Exposition Society on the pleadings was therefore erroneous.

4. Inasmuch as one action in ejectment can not be engrafted or spliced upon another, these two actions by the county commissioners and the Agricultural Society for the recovery of the same property from the same defendant can not travel along parallel lines in the same case. The motion to dismiss the cross-petition of the Agricultural Society was, therefore, properly granted in so far as it is a cross-petition or counter-claim; but in so far as this pleading was available for the purpose of combatting the claim of the plaintiff, as distinguished from an independent claim on its own behalf against the Exposition Company, it should stand, and the society should be allowed to remain in court to make its defense.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

Error to the court of common pleas.

The action in the court below is entitled "John W. Kerr, L. B. Bailey and Frank Wortsmith, as the Board of County Commissioners of Lucas County, Ohio, v. The Toledo Exposition Company and the Lucas County Agricultural Society." It was brought to obtain relief touching certain lands and was, it seems to us, in the beginning, very clearly and distinctly an action for the recovery of real property within the meaning of Section 5781 of the Revised Statutes of Ohio. The case has presented to us some puzzling questions, due largely to the changes made in the pleadings in the progress of the case in the court below, and to some changes in the opinions of the judges in the court below who had to deal with the case during its progress there. Judging from the journal entries, at times it appeared to the trial judges that it was an action for the recovery of real property, and at other times, that it was an equitable proceeding of some sort or description. But, in order that we may solve the problems presented, it becomes necessary for us at the beginning to determine the character of the action, and we have concluded that it is, and has remained throughout, an action for the recovery of real property; and that appears to have been the final conclusion of the trial court when the case was finally submitted and decided.

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It is provided by Section 5781 of the Revised Statutes that:

“In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same,” etc.

In the original petition in this case it is stated “that the plaintiffs have a legal estate in the following described lands and tenements” (and then follows the description). “That the said plaintiffs are entitled to the possession of said premises, and that the said defendants unlawfully keep them out of the possession thereof.” And the prayer to the first cause of action is: “The said plaintiffs therefore pray judgment against the said defendants for the recovery of the possession of said premises.” Then follows a cause of action for rents and profits, and a prayer for a large amount which the plaintiff claims is due upon that account.

In the amended petition—and just why an amended petition was filed we are not clear—it is not so distinctly stated that the plaintiff and the defendant the Lucas County Agricultural Society are in court in an adversary attitude. While it is stated that the plaintiff has a legal right in the land, it is also stated that the plaintiff is entitled to exclusive possession and that the exposition company unlawfully keeps the plaintiff out of possession of the premises; but the plaintiff continues to assert that it is entitled to possession, and it has made the agricultural society a defendant, and the agricultural society has not demurred or sought to be excused from answering in the case on account of the absence of direct allegations of adverse possession against it, but has filed a pleading in which it claims that it is entitled to possession of the premises, and from which it appears that if the exposition company is in possession, it is in possession under the agricultural society; and therefore, we think, upon the pleadings as they stood at the time the case was submitted and decided in the court below, it still remained an action for the recovery of real estate against both of the defendants named, and that

they both had a right to be, and to remain in court, at least to defend. There is a great deal more set forth in the amended petition than I have stated—some allegations that would seem to call upon the court for some form of equitable relief—but we think these allegations did not change the character of the action.

The case of *Raymond v. T., C., St. L. & K. C. R. R. et al.*, in the 57 O. S. Reports at page 271, affords a good illustration of the principle that matters of equity connected with an action to recover real estate do not change its essential character as an action at law. I shall only read the fourth clause of the syllabus:

“A petition against a railroad company by one out of possession of real estate, which alleges title and right to possession of the land in plaintiff, and charges a wrongful entry and possession by defendant, and prays that the defendant may show his interest therein, that it may be adjudged null and void, and that judgment for the possession of the property may be awarded plaintiff, and defendant enjoined from interfering therewith until compensation is made, states a case for the recovery of real property, notwithstanding the petition also contains allegations of threatened irreparable damage as a ground for relief by perpetual injunction, and of a dispute as to boundary lines, as a ground for action by the court in settlement of such dispute; and of a dispute as to title, as a ground for asking that plaintiff's title may be quieted. But such action being one in which either party may demand a jury is not appealable.”

It is said by counsel for plaintiff in error that this amended petition does not contain a prayer appropriate to an action brought under Section 5781 of the Revised Statutes. But we think the prayer is sufficient; for, among other things, the prayer is, that “The Toledo Exposition Company”—the company, I remark, which appears to be in the actual possession of the premises—“may be ordered to surrender the possession of said premises to this plaintiff, and that it be enjoined and barred from interfering with the possession or use of said premises,” etc., very much like the form of the prayer in the petition in the case to which I have just referred.

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As a further statement of what this case is about, I shall read a part of the statement made by the court below in deciding the case, or in his opinion after the trial:

“Briefly speaking, this action is brought by the Board of County Commissioners of Lucas County against the Toledo Exposition Company and the Lucas County Agricultural Society, to recover the possession of certain real estate of which it claims to be the owner, and which it alleges is wrongfully held by the defendant company (*i. e.*, the exposition company).

“The [agricultural] society, has, however filed a cross-petition against its codefendant, in which it alleges the same facts and asks the same relief as are set forth and demanded in the amended petition.

“The defendant company [and here the judge evidently refers to the exposition company] denies the right of either plaintiff or cross-petitioner to the possession of the real estate in controversy. The ultimate question of law to be determined is: To whom does this right belong?

“The plaintiff is authorized by Section 845, R. S., “to ask, demand and receive, by suit, or otherwise, any real estate or interest therein, whether the same is legal or equitable, belonging to their county.

“Therefore, if the plaintiff has a legal estate in and is entitled to the possession of the real property in controversy, judgment must be rendered in its favor.

“It being admitted that all of this real estate was purchased with money raised by general taxation, and paid out of the county treasury of this county, it becomes important to examine the statutes by virtue of which the appropriation of public funds for this purpose was authorized.

“February 28, 1846—9944 O. L., 70—an act was adopted by the General Assembly, entitled ‘An act to encourage agriculture,’ which provided that when thirty or more persons associated together as an agricultural society, organized by the adoption of a constitution and the election of officers, and gave an exhibition as required thereby, the county in which they resided was empowered to aid the society by the annual payment of not more than \$800. Sections 2 and 3 of the act provided that the society should annually offer and award premiums, regulate the same so that small as well as large farmers might compete therefor, and publish certain reports.

“The obvious purpose of this act was, by the offer of public aid, to encourage the organization of societies formed for the purpose of stimulating improvements in agriculture and its

products by the holding of annual exhibitions or county fairs, and the awarding of premiums open to general competition.

“February 15, 1853, this act was supplemented by a law now embodied in Section 3700 of the Revised Statutes, which provided that the societies then existing or thereafter organized for the purpose to which I have called attention, should become and be corporations, capable of suing and being sued, and of holding in fee simple real estate as sites whereon to hold fairs.

“The defendant, the Lucas County Agricultural Society, was incorporated and organized under and in accordance with the act of February 28, 1846, and the amendments thereto, and on the 1st day of June, 1870, with moneys furnished by this county, it acquired title in fee simple to twenty acres of land situated in Section 33, Washington township.

“April 18, 1874—O. L., 190—an act was passed by the General Assembly authorizing the county commissioners of this county to levy a tax for a term of years ‘for the purchase of additional grounds and improvements of the grounds’ of the Lucas County Agricultural Society.

“By Section 4 of this act it is provided that all grounds purchased, and improvements made as aforesaid, shall be under the exclusive control and management of the board of directors of said agricultural society, and the title to all of said grounds and improvements shall be vested in fee in said Lucas county.

“By virtue of the powers thus conferred, the board of county commissioners, on the 25th and 29th days of November, 1882, acquired title in fee simple to about twenty-three acres of land adjoining that purchased by the agricultural society.

“August 13, 1892, the agricultural society entered into a written contract with the Toledo Exposition Company, a corporation, whereby the former attempted to grant the latter ‘the right and use’ of all said real estate for a term of twenty years. Thereupon the exposition company entered into possession of said real estate made improvements thereon, and has continuously ever since, remained in the exclusive occupancy and control thereof.”

The court below treated these as conceded facts, and we think that by the pleadings they are substantially so; this statement may require some slight modification, but, for the purpose of my remarks, it may be treated as true. Most of these facts are stated in the amended petition; and it is there said that this grant or right under the written contract or

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license, was in consideration that the Toledo Exposition Company should and would each year hold and give a public fair and exposition of the products of agriculture, horticulture, manufacturing and live stock, and such other entertainment in the branches of industry as shall be of interest and benefit to the people of Lucas county, Ohio, and surrounding country, and that this right was given for that and no other consideration; in short, that the exposition company should hold an annual agricultural fair on these premises. The plaintiff avers that this written license—as it is called in the amended petition—“was made without authority from, knowledge or consent of, the Board of County Commissioners of Lucas County, Ohio.” And that it was, is, and at all times has been, null, void and of no effect. That the Toledo Exposition Company took possession in pursuance of this license; that it has failed to give such a fair as it was privileged and bound to give upon these premises; that it has become and is insolvent and unable to give such fairs; that from the year 1902 down to the time of the filing of the petition, it has “not only failed to give any exposition on said grounds, but without any authority whatever, have used and rented said premises and permitted the same to be used, and are now using and permitting the same to be used for keeping, training and racing horses and selling of beer and other intoxicating beverages, and for other uses and purposes of gain, all of which were unauthorized by virtue of said license and contrary to law; and have wholly abandoned the use of said premises for the purpose authorized by said license and by each and all of said acts, the defendant, the Toledo Exposition Company, has forfeited any and all rights which it sought to acquire or did acquire by virtue of said written license,” and that its rights in the premises have ceased and determined, and whatever rights the defendants may have had in the premises have become forfeited to the plaintiffs.

A cross-petition was filed by the agricultural society setting up substantially the same facts with respect to the giving of this license, the consideration for it and the failure of the exposition company to comply with its terms. The prayer of this

cross-petition is against the defendant, the Toledo Exposition Company, for the possession of the premises.

Under the statutes providing for the purchase of these grounds and under which they were acquired, it appears that the legal title to one tract was taken in the county for the use of the agricultural society, and, as we construe it, in order that the agricultural society might use it for the purpose of an agricultural fair, because the agricultural society had no other business or concern with it. The fee was vested in Lucas county. The title to the other tract was taken in the agricultural society, but the law contained the following provision :

“When the society is dissolved or ceases to exist in any county where payments have been made for the purchase or improvement of sites for the use of such society, the improvements and real estate shall vest in the county making such payments.”

The county, through the commissioners, is here asserting its right to the possession of the one tract by virtue of its legal title and the cessation of any legitimate use thereof by the agricultural society, and to the other tract under the provisions of the statute that I have just read, to the effect that when the society is dissolved or ceases to exist, the improvements and real estate shall vest in the county making the payments. These allegations of the amended petition and the cross-petition of the agricultural society are in part admitted, and in part denied by the Toledo Exposition Company; and the exposition company sets up some new matter of alleged estoppel, which is denied by the plaintiff in error.

The answer of the Toledo Exposition Company to the plaintiff's amended petition “denies each and every allegation in said petition contained which is not herein expressly admitted to be true.” And it is not admitted that it has done any of the things averred with respect to the misuse of these premises which plaintiff claims have resulted in a forfeiture. It is also expressly averred therein that the exposition company had complied in all respects with the conditions of the contract and

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license, and that it has not done anything unlawful or that should result in a forfeiture.

It appears that the case was tried for some days to the court on the theory that it was an equity case, and the court held the case under consideration for some months, and then concluded that it was not an equity case, and what was then done appears from the following journal entry, under date of March 12, 1906:

“This day came the parties to this action by their respective attorneys and thereupon the plaintiffs moved for judgment against the defendant, the Toledo Exposition Company, upon the pleadings filed in this action, and also the defendant, the Toledo Exposition Company, moved for judgment on the pleadings filed in this action dismissing the cross-petition of the defendant, the Lucas County Agricultural Society, and the court being fully advised in the premises, finds the said motion of the said plaintiff for judgment on the pleadings against the defendant, the Toledo Exposition Company, well taken and should be granted, and that on said pleadings the said plaintiffs are entitled to the immediate possession of the real estate described in the amended petition, and that the defendant, the Toledo Exposition Company, is unlawfully keeping plaintiffs out of the same as alleged in said amended petition, to which action and finding of the court, the defendant, the Toledo Exposition Company, then and there in open court duly excepted.

“And the court further finds that the said motion of the Toledo Exposition Company for judgment on the pleadings against the Lucas County Agricultural Society dismissing its cross-petition against the said the Toledo Exposition Company is well taken and should be granted, to which action of the court the defendant, the Lucas County Agricultural Company, then and there in open court duly excepted.”

Appropriate judgments follow. The Toledo Exposition Company prosecutes error here to the action of the court in giving judgment against it; and the agricultural society, by cross-petition in error, prosecutes error to the finding and judgment of the court against it dismissing its cross-petition.

It appears from the opinion of the court which we have before us (to which I am sure I shall not do full justice in undertaking to state the substance, but which I can not take time to read in its entirety), that the court was of the opinion that,

by the giving of this lease or license, and the surrender of possession of these premises and ceasing to hold fairs itself thereon, the agricultural society lost or forfeited all its rights in the premises under and by virtue of the provision of the statute, to the effect that when the society is "dissolved or ceases to exist" in any county, etc., the improvements and real estate shall vest in the county; and further, that the lease or license was so far illegal and void that the exposition company acquired no rights under it, and therefore, the judgment should award the possession to the board of county commissioners of the county, as against both these defendants; and it was so determined.

This action of the court appears to have been based largely, if not entirely, so far as judicial authority is concerned, upon the case of *The Trustees of the Canandarqua Academy v. James McKechnie et al.*, found in the 90 N. Y. Rep., page 618. The gist of that case so far as the point involved here is concerned, is stated in the first clause of the syllabus, which I shall read:

"The Ontario Female Seminary was incorporated for the purpose of conducting a school for the education of females, and by its charter (Chap. 145, Laws of 1825), it was declared that its funds should 'be exclusively devoted to female education.' Plaintiff advanced to said seminary \$1,000, under a resolution authorizing such advance on condition that when the seminary 'shall cease' it shall return that sum on demand, and shall give security for such return on its real estate. As such security, the seminary, in 1827, gave a mortgage, which recited the resolution and contained a condition to the effect that 'in the event of said seminary ceasing,' and if it shall not pay said sum on demand, the plaintiff could foreclose, etc. Said seminary subsequently executed another mortgage upon the premises, which was foreclosed and the premises sold, and the seminary thereupon ceased to maintain any school and has not since exercised any of its franchises; it was divested, by the sale, of all its real estate, and had thereafter no means to enable it to keep or maintain any school. *Held*, that the seminary had 'ceased' within the meaning of the contract, and the contingency had happened upon which plaintiff was entitled to demand the sum advanced; that a formal dissolution of the corporation was not necessary, and that upon refusal to pay the money on demand, plaintiff was entitled to foreclosure.'"

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It will be observed that that case turned upon the construction of a contract. A donation of \$1,000 had been made, which was to be repaid when the seminary should cease; and we think that the construction given by the court to that contract was a fair and reasonable one; that the word 'cease' was intended to mean and did mean the cessation of the school, and we think this case would be much like that if the Legislature had provided that upon the agricultural society ceasing to maintain or carry on a fair, the property should revert to and vest in the county. That is the construction put upon this statute by the court of common pleas, but we can not bring our minds to accept that construction. While the words in this provision of the statute are "dissolved or cease to exist," and the court below is of the opinion that "cease to exist" must therefore mean something else or something different from "dissolve," we entertain the view that the phrase contains mere tautology; that "ceases to exist" there means ceases to exist as a corporation, and not merely ceasing to carry on such fair as the corporation should carry on and that the agricultural society is not divested of its right to the property by mere non-user thereof. We think this view is sustained by a case to which we are cited: *Austin Webb v. Vandever B. Moler*, found in the 8th Ohio, page 548. The character of the case is made sufficiently apparent by what is said by Judge Lane, who delivered the opinion. It is very short and I will read it:

"No proposition is more thoroughly established than that the franchise of a corporation can not be forfeited without a judgment either on *scire facias* or *quo warranto*. Abundant authorities are cited to this effect in the argument.

"The court of common pleas seems to have considered, that although corporate franchises can not be divested without a judicial sentence, corporate property might be lost by non-user alone. No such distinction is known in law. The capacity to hold land in one franchise. The grant of land to a corporation is called, by Blackstone, 'an estate for life, which may endure forever, or which reverts to the donor only when the life of the donee is terminated.' 1 Black. Com., 484.

"Among the multitude of authorities bearing on this point, it is enough to refer to two from New York: 6 Cowen, 23; 1 Hall. 97. The doctrine these authorities declare is, 'that pro-

ceedings of trustees of a corporation, *de facto*, are valid until ousted by a judgment in a proper suit, and that no advantage can be taken of any non-user, on the part of a corporation, by any defendant in a collateral action.

“The trust of a charity is not lost by the trustees’ neglect of duty. If it can not be carried into execution, the land may revert to the donor. But where it can be enforced, a court of chancery will furnish all needful relief.”

Of course, it is not pretended here by the representatives of the county that the corporation has been dissolved or that it has ceased to exist, in the sense that it is no longer a corporation. We think it fairly appears from the pleadings and is an assumed fact in the case, that the organization is kept up, and we are of the opinion that it may be rehabilitated; that it may resume its functions and duties as a corporation, and that if it had such rights as it asserts against the exposition company, it may repossess itself of its property and enter upon the holding of agricultural fairs, for aught that appears in the pleadings in the case.

Entertaining these views, we hold that the judgment on the pleadings as against the agricultural society—for it is in effect that—that the plaintiff has a right to the possession of these premises—is wrong. Reasons why the right of possession may have been forfeited by or possession may be taken away from the agricultural society and full dominion over the property may be given to the county, may appear in the further progress of the case; but we are of the opinion that the giving of this lease or license, and the ceasing upon the part of the agricultural society to hold annual fairs, do not alone and *ipso facto*, deprive it of its right of property or its right of possession of and control over the property.

As to the exposition company, it appears to us that it is a mere tenant of the agricultural society. Whether it has forfeited its right to the agricultural society so that the agricultural society may resume possession of these premises, we need not now determine. It has a right to stand here on its defenses under the title and right of the agricultural society, and we conceive that its rights do not fall below and can not rise

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above those of the agricultural society. The plaintiff, to prevail against these two defendants, must, as a necessary part of its case, make it appear that the agricultural society has lost all its rights, whereby the county has full right to possession as against both defendants. Therefore, it appears to us that a judgment against the exposition company on the pleadings is necessarily erroneous.

I now come to a consideration of the case presented upon the cross-petition of the agricultural society and the action of the court thereon. It fairly appears from these pleadings and the arguments of counsel, and, indeed, counsel very candidly declare that the board of county commissioners and the agricultural society are working in harmony; that they are indifferent about which one prevails against the exposition company. But they are not here in the same right; they are not here standing upon the same premises; they are not here asserting joint rights, but they are standing upon independent grounds; the county is claiming the right to possession for itself and the agricultural society claiming the right to possession for itself. The board of county commissioners has brought what we are in the habit of calling "ejectment" (a short and easy name, used for this style of action because it closely resembles the old action in ejectment), against the exposition company, and, as we view it, against the agricultural society. The agricultural society, by its cross-petition, brings an action of ejectment on its own behalf against the exposition company.

It is said that they may do this under the code, either by cross-petition to determine the rights of all the parties in the subject-matter, or by way of counter-claim. When this cross-petition was filed, a demurrer to it was filed by the exposition company, the claim of that company being that this was not properly a counter-claim; that it was not the kind of a claim that could be asserted by a cross-petition in the action. A majority of this court are of the opinion that that contention was correct. This demurrer was overruled.

A motion was afterwards made to strike the cross-petition from the files; and we think that, in so far as it is a cross-

petition, it should have been stricken from the files—it ought to have been gotten out of the case in some way. We are of the opinion that one action in ejectment may not be engrafted or spliced upon another action in ejectment as attempted here.

We know that the provisions of the code are very liberal, and that its purpose is to settle, as far as possible, all controversies between parties respecting the subject of an action, and that in cases where land is to be sold and a fund distributed, where there are equities to be determined, and in a variety of actions of that sort, everything that might have been done formerly in an action at law and by a bill in equity touching the same subject of an action, may be done now in a so-called civil action, but we have no knowledge of any case where two actions, distinctly at law, carried on together for the recovery of the possession of real estate, have been sustained by the court. If the plaintiff should fail in the action which it brings into court for the possession of this real estate, it would not have the least interest in the action of the agricultural society on its so-called cross-petition. It is difficult to see how the case could well be submitted to a jury without very great confusion and difficulty; and we do not think it is the purpose of the code to promote confusion in trying to effect the purpose of preventing a multiplicity of actions. If the board of county commissioners had brought an action against these two defendants charging them with trespass, we think it would have been a very strange and unwarranted proceeding for one of the defendants in the same action to file a so-called cross-petition or counter-claim against his co-defendant admitting that a trespass had been committed but alleging that it was committed by the co-defendant against it and not against the plaintiff, and asking that it might have a judgment on account of the trespass. We think that in this character of suit the subject of the action is the claim of the plaintiff to possession of the premises. It is so held in a number of authorities in New York, to which our attention has been cited, and we know of nothing directly upon the subject in this state. It is true that there are various actions in which the subject of the action is the land itself, but we think that is not so in an action of ejectment.

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The case of *Brown v. Kuhn* in the 40 O. S., page 468, is a case where the facts are complicated, and I shall not try to state them, but I will call attention to a remark by Judge Granger in his opinion. At page 486 this is said:

“But the law does not allow two petitions by different plaintiffs in the same action. It does not permit a *petition* containing different causes of action in one of which one set of plaintiffs are alone interested, and a second in which another set of plaintiffs are alone interested.”

And it is pointed out that the answer could properly seek relief only touching the subject-matter set up in the petition. What is quoted does not make very clear what was involved, and it could not be made very clear without taking more time than I care to devote to the case, but it indicates the views of the court on the subject of two actions at law traveling along parallel lines in the same case against the same defendant—that it is not permitted and can not be done. If the agricultural society conceived that it had a cause of action to recover possession of these premises from its tenant, it should have instituted an action in that behalf. The purpose the parties appear to have in view might be accomplished through the acquisition by the county of the rights of the agricultural society, so that the county could sue not only in its own right, but in the right which it now appears to us is lodged in the agricultural society. I merely suggest that, but I have not thought it out; it may be entirely impracticable. But they are not here in the same right now; they are asserting entirely independent claims, each on behalf of itself, to recover this property from the exposition company, and this, we think, can not be done.

In so far as any pleading that the agricultural society has filed or may file constitutes an answer to the claim of the plaintiff, in so far as it may be available for the purpose of combating the claim of the plaintiff, whether you call it an answer, or cross-petition, or counter-claim, or what not, so far as it may stand in opposition to the claim of the plaintiff rather than as an independent claim on its own behalf against the exposition company, we think it should stand; that the agricultural society

should remain in court to make its defense. We hold, however, that the order of the court dismissing its cross-petition, is not erroneous, unless it may be open to the construction that the dismissal was on the merits and not without prejudice. The judgment of the court of common pleas against the exposition company will be reversed; that part of the judgment dismissing the cross-petition of the agricultural society will be modified so that it may not prejudice the society in any future action on the same cause of action. As I have indicated, we regard the agricultural society a proper defendant and still in court for the purpose of asserting defensively any claim that it may have against the claims of the plaintiff.

Judge Wildman does not concur in our views expressed on the subject of the cross-petition.

WILDMAN, J.

I am unable to concur with the majority of the court as to the disposal of the cross-petition filed by the Lucas County Agricultural Society. On all other questions involved in the case I am in accord with my associates.

The action was brought in the lower court by Kerr and others, as county commissioners, asserting both title and right of possession to the land in controversy. The agricultural society and the exposition company were both properly made defendants. The exposition company was in possession, and the agricultural society, equally with the plaintiffs, was a claimant to both title and possession. Its claims were adverse to those of the other parties and were "connected with the subject of the action," which, as I view the law, was the land in dispute.

The majority of the court seems to place some reliance on supposed adjudications in New York as to the scope of a counter-claim under our code procedure, defined in Section 5069, of the Revised Statutes, and treat the "subject of the action" as "the claim of the plaintiff to possession of the premises."

The claim of the plaintiffs is larger than a mere possession.

They assert title as well as right to possession, and the claim of the agricultural society, as alleged in its cross-petition, is equally broad.

These claims are inconsistent and adverse. They are connected with the land, and the land itself, rather than the claim of either party to it, is the "subject of the action." The rights asserted constitute "the causes of action," not its subject.

That this is the proper distinction is clearly indicated in several adjudications and text-books, and has been recognized even in New York. See language of the opinion in *The Glenn & Hall Mfg. Co. v. Chas. S. Hall*, 61 N. Y., 236, where the "property" is said to be the "subject of the action" in a "real action" (such as the one before us), although it may in some other cases be a "violated right."

Bliss in his work on Code Pleading, Section 127, says, that the New York Court of Appeals has been less liberal than other courts in its construction of the phrase "subject of the action," as applied to counter-claims, and in Section 126 says that the land is the subject of the action in ejectment. Phillips (Code Pleading) gives substantially the same rule both as to land in ejectment suits and as applied to personal property in replevin suits. See Phillips, Section 181, note 1, Section 330 and Section 252, and also *Loversohn v. Ward*, 45 Cal., 10.

In our own state this rule was applied to personal property in *Morgan v. Spangler et al*, 20 O. S., 38; and in *Peter v. Farrel Foundry & Machine Co.*, 53 O. S., 534, definitions and principles were adopted and enunciated which seem to me decisive of this question in Ohio. See pages 552 to 556 inclusive, in which Judge Bradbury discusses and construes several sections of our civil code of procedure applicable to counter-claims, cross-petitions and the scope of the court's jurisdiction when invoked.

In the case at bar the court had all parties asserting title to the land in controversy before it; their claims were adverse and related to the same land; and under the policy of our liberal code of preventing a multiplicity of suits, the agricultural society should, in my judgment, be permitted to litigate its claims against not only the plaintiffs, but its co-defendant. The com-

plexity of issues or difficulty of trying them to a jury is not so great as in many a case of set-off or counter-claim clearly permissible under the code; but, however complex or difficult, the cross-petition asserted what our statute defines as a counter-claim:

“A counter-claim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, * * * and connected with the subject of the action.” R. S., 5069.

No question is or can be made that, under R. S., 5006, the agricultural society was not properly made a defendant, and R. S., 5311, provides that the court “may determine the ultimate rights of the parties on either side, as between themselves,” and R. S., 5782, gives to a defendant in an action to recover real estate, special and express power to plead such matters of counter-claim “as he has or might have in any other form of action, whether they are such as have heretofore been denominated legal or equitable, or both.”

Kohn & Northrop, for plaintiff in error.

C. W. Everett, for the agricultural society.

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SPECIAL INSTRUCTIONS TO JURY WHERE SPECIAL VERDICT IS ASKED.

[Circuit Court of Hamilton County.]

THE VILLAGE OF MADISONVILLE ET AL V. ROSSER & CASTOE ET AL

Decided, July 14, 1906.

Charge of Court—Special Verdict—Requires Full Instructions as to the Facts to be Found—Measure of Damages—Where a Water Tower Failed to Come up to the Specifications.

1. A request for a special verdict renders it necessary that the jury should be fully instructed as to the facts which they are required to find, and this necessity is not met by the general instruction that they must find the facts necessary to determine the case.
2. In an action to recover on a contract for building a water tower, which the answer alleges has not been constructed in accordance with the specifications, the proper finding for the jury to make is not the amount of money which would be required to make the tower conform to the specifications, but the diminished value of the tower by reason of the failure to construct in accordance with the specifications.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

This action is founded upon a contract for the construction of a water tower for the Village of Madisonville. Plaintiffs below, in their amended petition, aver that they performed their part of the contract in accordance with the plans and specifications, and aver that said specifications provided, among other things, that no payment shall be made until the engineer has approved the same, and that he has and does withhold, upon insignificant and frivolous grounds, and therefore wrongfully and unreasonably, his approval of the payment in full upon said contract, but insists upon a large and unreasonable reduction on the contract price thereof.

The defendants, by answer, admit that the engineer has refused to approve payment, but deny each and every other allegation.

At the request of the defendants the jury was instructed to return a special verdict, upon which the court rendered judgment for the entire amount claimed less five dollars for the value of a pressure gauge which the plaintiffs failed to provide according to the contract.

The plaintiffs requested that a special instruction be given to the jury, that in the event the jury find that the plaintiffs had failed to build a tower and tank in accordance with the plans and specifications, they also find on the evidence certain specified facts, which the court refused. At the conclusion of the general charge the defendants excepted to the same for the reason that it did not point out the particular issues and questions of fact to be determined by the jury, and after the jury returned its verdict the defendants requested the court before the jury was discharged, to direct the jury to retire and consider and return its findings on certain specified facts relative to the issue, which the court refused and to which the defendants excepted.

The jury was instructed in general terms to ascertain and find in its verdict, the facts necessary to a determination of the case, but the court nowhere pointed out to the jury the precise issues, nor the facts, which when ascertained, would leave nothing for the court but to draw from them conclusions of law. It is said in *Railroad v. Lockwood*, 72 O. S., 586, that—

“ In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require.”

This is required when a jury return a special verdict no less than when the verdict is general. Indeed, it would seem from Section 5200, Revised Statutes, which defines a special verdict, that it is even more essential that the jury should be fully instructed as to the facts which they are required to find, and upon which only the court can render judgment.

We see no objection to the special instruction requested after the argument, unless it be the fourth subdivision, which required

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the jury to find the amount of money it would take to make such tower and tank conform to the specifications.

The bill of exceptions does not contain any evidence, nor does the special verdict disclose whether the tower and tank could have been made to conform to the specifications without rebuilding the entire tank, and a more appropriate finding would have been the one suggested to the court after the verdict was returned and before the jury was discharged, to-wit:

“ The diminished value of said tower and tank, by reason of the failure to conform to the specifications as set out in finding three.”

With this exception, we think the court erred in refusing to give the special instruction, inasmuch as the court failed to instruct the jury upon this subject in its general charge. It appears from the record that the court was under the impression that counsel for plaintiffs having submitted a form of special verdict, and the defendants having likewise submitted a special verdict, thereby the jury were fully instructed as to what facts they were to return in the verdict, but manifestly the forms presented by the respective parties differed, each submitting the one most favorable to his theory of the case, and the jury were allowed to make any finding from either of the forms, and add others such as they might deem essential, without any instruction from the court as to what were necessary and essential to enable the court to draw conclusions of law. To illustrate the effect of the failure of the court to charge as requested, the jury returned as one of its findings that the engineer refused to finally approve the payment for the job, which was already admitted by the pleadings, and failed to find upon what grounds the refusal was based, although put in issue by the answer.

There is no finding whether the plaintiffs through inadvertence or willfully furnished bent and crooked columns and left the surface of the abutting posts not in contact at all points, and painted the tank inside and out before being inspected and tested. We think, however, it may fairly be inferred that it was not done willfully, and that there was a substantial per-

formance of the contract, but this does not relieve the plaintiffs from deducting from the contract price such loss or expense incurred by the defendants by reason of such defects and violation of the contract.

We think it may fairly be assumed that the defendants did sustain loss thereby, and they were entitled at least to an affirmative finding of the amount, if any, thus sustained.

BOUNDARY LINES FOLLOWING NAVIGABLE STREAMS.

[Circuit Court of Wood County.]

LEWIS OVERLY V. THE STATE OF OHIO.

Decided, May, 1906.

Venue—Prosecution for Illegal Fishing—In Stream Forming Boundary Line Between Two Counties—Charge of Court.

1. Where an island in an unnavigable stream forming the boundary line between two counties, lies substantially south of what would be the middle thread of the entire stream, extending only eight or ten feet north thereof, and the channel south of the island is not more than half the width of that on the north, the boundary line follows the thread of the northern channel, and the island lies in the southern county.
2. Venue in a prosecution for illegal fishing on the northern shore of such an island is properly laid in the southern county.

WILDMAN, J. (orally) ; PARKER, J., and HAYNES, J., concur.

The plaintiff in error, Lewis Overly, was charged and convicted in the justice's court with illegally fishing in the waters of the Maumee river, and the sole question arising here, though presented in different forms, is really one of venue.

It is not contended on behalf of the plaintiff in error that the evidence does not disclose a violation of the law on his part in the act described in the indictment. It is substantially conceded, and the evidence shows that he did fish for black bass in violation of the statute, but it is claimed that he was improperly

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prosecuted and convicted in Wood county; that the precise point where he violated the law was within the boundaries of Lucas county, rather than Wood county.

The matter has been very ably argued and numerous authorities have been cited in support of the contention in behalf of the plaintiff in error, and in behalf of the state. It is not my purpose to review these authorities. It is sufficient to say that we are not disposed to disturb the conclusion arrived at by the court below, in his rulings during the trial and the instruction which he gave to the jury as to how the boundary line between Wood and Lucas counties was to be ascertained. He substantially followed the rule of the Supreme Court of Ohio in the case of *Benner's Lessee v. Platter et al*, 6 Ohio, 505, following especially the language of Judge Wright, who delivered the opinion, as expressed on page 508 and following. This rule was consistent, also, with the decision of this court in the case of *Ludwig v. Overly*, in 19 C. C. R., 107, and also with certain decisions of the Supreme Court of the United States in determining boundary lines between some of the states along the Mississippi river on either side.

The question as presented in the case in the 6th Ohio is not altogether free from obscurity; nor indeed does the principle which governs cases of this character appear very well defined by the adjudication. It has been established by a long course of authority that in Ohio the boundary line between ownerships and probably between political territorial lands of the state where a stream of water is defined as part of the boundary, will be the thread of the stream; in other words, the middle line between the banks, having no regard for the depth of the channel. It is claimed on one side that where an island intersects a part of said line, lying partly on one side of the line and partly on the other, that the line will still follow the middle of the entire stream. The substance of the holding in the case of *Benner's Lessee v. Platter et al*, to which I have referred, is that in legal contemplation the main channel, or rather the thread of the main channel of the stream is to be taken in such cases as the boundary line. It is not, perhaps, apparent in that case that the island did intersect the middle line of the

stream, but the court lay down the very broad general proposition, that a boundary on a stream, not navigable, is a call for the channel or middle of the stream—a call for the main stream, not a mere branch or a narrow channel. Judge Wright, in this decision referred to, says that “whether where the tract claimed as an island be one, that is, land permanently surrounded by water, or a peninsula, sometimes insulated by water flowing through a ravine, or into a bayou, makes no difference. The boundary being the main channel or center of the creek, islands, properly so-called, will belong to the proprietor of that side of the channel where the island is found. This disembarrasses the case of the inquiry, whether the disputed land is an island or not”; the discussion suggested growing out of the fact that there was some question in the case whether the particular tract of land called an island was such, or whether it was a peninsula or part of the main land.

In the case at bar, the island which the defendant in error claims shifted the boundary line further north, lies almost south of what would be the middle of the entire stream. It is not contended on behalf of the defendant below, the plaintiff in error here, that more than eight or ten feet in width of the island projected north of this line. The island then was substantially south of what would be the middle thread of the river, and the channel south of the island is not much more than half the width of that on the north. The north channel was properly deemed by the jury to mean the channel the center of which should mark the defined line between the two counties, the boundary line. Considering the case with this view, we are not disposed to disturb the verdict rendered, and the judgment rendered by the court thereon will be affirmed.

L. F. Conway, for plaintiff in error.

J. E. Ladd and *E. G. McClelland*, for the state.

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CONSTRUCTION OF CONTRACT OF SALE.

[Circuit Court of Wood County.]

WILLIAM A. GILLS V. SIMON GEORGE.

Decided, May 4, 1906.

Sales—Absolute and Executory—Contract of Sale—Bailments—Passing of Title.

A contract for the sale by A to B of twenty-two cattle, of a specified aggregate weight and at a named price per pound, payment not to be made for some months, during which time the cattle were to be fed by B and then re-sold to A at an increased price per pound, is not a bailment, nor is it an executory sale from A to B, but the sale is absolute and title passes, and loss from injury to the cattle while they are in the possession of B, and before the time fixed for their resale to A, must be borne by B.

WILDMAN, J. (orally); PARKER, J., and HAYNES, J., concur.

In the case of Gills v. George a very peculiar question is presented for our consideration, and one with regard to which it is not strange that the minds of intelligent men may not be in unison.

The case is presented upon the pleadings, an agreed statement of facts, and the ruling of the court below. It appears from the agreed statement that William A. Gills and Simon George, on November 3, 1904, entered into a transaction with regard to certain cattle. Gills was the owner of the cattle and they were delivered to the defendant, George, and a writing drawn between the parties, intended to be in duplicate. There is some slight variation in the phraseology, but they are substantially alike. The one before me reads as follows:

“Nov. 3d, 1904. W. A. Gills sold this day to Simon George, 22 cattle, weighing 20,259 lbs., at 3½c., to be paid for when taken back, 1905. Said George sells said cattle back to W. A. Gills, to be taken from 15 May to 15th June, 1905, price 5 cents per lb. Said George is to shrink 3 per cent. when taken up by W. A. Gills.

“(Signed)

“W. A. GILLS,
“SIMON GEORGE.”

Each of the duplicates is signed by both parties. On May 14th. 1905, the barn in which the cattle were, was struck by lightning and a large number of them were killed, and others injured. The principal question here is, on which of the two parties the loss shall fall.

Let us analyze the first part of this contract, to ascertain, if we may, to what extent it embodies an executed transaction between these parties; that is, a transaction executed on the day of the delivery of the cattle to George. Perhaps I ought to stop long enough, however, to say that there is some dispute as to whether this writing constitutes only one contract between the parties, or whether there are two separate and distinct contracts.

The defendant, George, insists that these cattle were left with him in bailment, to be cared for and fed, and finally returned at the period mentioned in the writing, and that the difference between the amount recited as the payment for the cattle by him and the price which he was to receive, was really intended as a compensation for the care which he was to give to the property. On the other hand, it is insisted that Gill actually sold the cattle to George, that the sale was completed, and that George thereby became liable to pay the purchase-price of $3\frac{1}{2}$ cents per pound for the number of pounds specified in the writing, to-wit, 20,259 pounds.

We do not deem it very important to discuss the question as to whether there is one contract or two. My own judgment is that there is but one contract, and that there would be but one contract if there were two writings, in one of which the obligation of Gills were stated and in the other the obligation of George, for it was but one transaction, no matter whether embodied in one writing or two. But the principal question is not thereby solved.

To determine the effect of a consummated transaction of November 3d, 1904, and the intention of the parties as to a transaction in 1904 let us see whether the phraseology of the writing may not be, to some extent, simplified. It is to be noted that a definite number of cattle is mentioned; a definite weight in pounds, to be paid for at a definite price per pound; which is as much as to say that William A. Gills has sold this day to

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Simon George, 22 cattle for the agreed price of \$709.06, because this is the amount ascertained by computation to be the sum which, under those circumstances, and if there were nothing else in this writing, would unquestionably be due from George to Gills as the purchase-price of the stock.

We are inclined to think that the mention of the number of pounds and the mention of the price per pound does not change this rule. If it had been indefinite, if there was something to be ascertained by weighing, or counting, or otherwise, so that it was not susceptible of mere computation to determine how much George was to pay, then an entirely different question would arise; but so far as we have proceeded with this contract, there is a statement that a sale was made of certain property at a certain definite price, and then we reach the provision as to the manner and time of payment. The writing says, "to be paid for when taken back by Gills." That is to say, that when, in the subsequent provision of the contract, in the other transaction provided for by its terms, the same stock should be surrendered by George and received by Gills, that then George is to pay the \$709.06. subject, however, to another provision, and that is, that he is to receive something from Gills, and the contract proceeds to tell what that shall be. It shall be an amount, not fixed and certain, not already determined, but it is to be determined by the weight of the cattle at the time they are so surrendered by George to Gills at a specified price per pound, subject to a shrinkage of 3 per cent. of the aggregate weight of the cattle at that time.

Our judgment, without dwelling longer upon the first branch of this contract, is that, by its terms, the parties having used the word "sold," a sale was effected, and George became the owner of the cattle.

It is well argued by counsel that the use of the word "sold" in the first branch of this contract, and the word "sells," in the second, is not conclusive of the question as to whether this was a sale or a bailment. We agree with counsel on this point, but we are not disposed to reject words used by the parties to a transaction, if they throw light upon what was intended. We think that to construe this contract as defendant would have us

construe it, requires the rejection of the word *sold* in one case and *sells* in the other, because, if counsel for defendant is right, there was no sale in the first place, and no agreement to sell in the other. Contracts are to be construed without the rejection or change of the phraseology used by the parties, if it can be done without prejudice to the sense apparent from the entire writing.

Now, it has occurred to us that, although Mr. Gills was a dealer in stock, and Mr. George was a farmer, having land adapted to the grazing or pasturage of cattle, and, although it was intended that the identical cattle should be returned at the time stated, by George to Gills, still the question may have arisen as to who should stand the loss in case there should be any injury to the cattle while in the possession of George; as, for instance, in case of some accident to them; or whose should be the loss in case of disease or death of a part or the whole of the herd. It is not probable that these parties had in their thoughts such an extraordinary event as that which did occur—the striking of the barn or place where the cattle were by lightning, and the destruction of a large number of them; but it is altogether likely that Mr. Gills, the owner of the stock, when he entered into this deal with Mr. George, desired that Mr. George should be accountable for the proper care and treatment of the stock to prevent diseases, and also for care in their preservation as against any sort of danger. He was willing to rely, to a certain extent, upon the personal interest of George to preserve the stock and increase their weight by the treatment which he should give to them, and to induce the care of this stock by reason of such personal interest, the additional price per pound was stipulated as a payment to George upon redelivery or sale of the stock to Gills. But provisions in contracts that they should be held at the owner's risk, or that one party or the other shall suffer loss in case of destruction by fire, are not very uncommon in various classes of contracts, and here, if this had been a bailment, it would have been not unnatural to have a clause inserted as to who should suffer the loss, in case of disease or injury. The parties sought to provide, upon the question as to who should suffer in case of loss, by an entirely different provision. They did not say that the defendant, George, receives the stock to hold and care for

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during this period, and is to receive certain compensation, and during that time they are to be held at the risk of the one party or the other, as regards injuries or otherwise, from the elements; but instead of that they provide that the transaction shall be a sale, and George shall become the owner, thus guarding Gills from loss; for, during the time, he would have no opportunity to see that the cattle were protected from injury.

The question remains as to whether, by the terms of this arrangement, George resold to Gills, the title then passing, or whether it was an executory sale, that is, a contract by which, when certain things were done, the title to the stock should pass to Gills. But now two things were left to be done. One was the delivery of the stock and the other was the payment of a price, which, before its payment, was to be ascertained by the weight of the cattle. It is not said in so many words that the cattle were to be weighed, but manifestly, there was no other manner by which the price of the cattle could be ascertained. It is not stipulated which party should weigh them, but they were to be in the care and control of George and, so far as the form of this contract is concerned, he was to be the vendor; he was to sell the property back to Gills and was to receive for the property five cents for every pound, subject to the shrinkage of the aggregate weight of three per cent.

A large number of cases have been cited to us bearing upon the question as to the effect of such conditions in sales. The question has often arisen as to when a sale is executory and when one becomes executed, when the title passes.

At the time of this fire, the 14th of May, the day before the beginning of the period during which the weight of the cattle was to be ascertained, and the stock turned over to Mr. Gills, the weight of the stock had not been taken. George was to be permitted to subtract from the price which he had agreed to pay as the purchase-price of the stock when he received them, the price which would be due to him from Gills upon the reselling. His right was somewhat in the nature of a recoupment or counter-claim, which must be ascertained in some way before it could be subtracted from the amount which was at that time owing, though not yet due, from him to Gills.

In the 13 C. C. Rep., 631, is the case of *Parker v. Davis*, decided by this court while Judge Haynes, Scribner and King were upon the bench, Judge Haynes announcing the opinion. This was a sale of a certain stock of goods and chattels, and the price was fixed by an inventory taken, not entirely by the vendor, but by third persons, selected by both vendor and vendee, and it was held that when the price of the stock had been fixed by the taking of the inventories, and not before, the title passed. On page 639, Judge Haynes says:

“Without going through the charge of the court, it is sufficient to say that the court, in our judgment, properly took this view of the case; that under this arrangement and agreement, there must have been not only the inventory taken of the goods—the amount ascertained—but that the notes and mortgages must have been given, and everything must have been done between the parties before the title would pass, or before there would be any risk in regard to the loss on the part of Davis.”

This was a sale by Parker to Davis. Now, it has been somewhat of a question sometimes as to whether delivery is not essential to the passing of the title. We think, however, that under the decisions in Ohio this is not the rule, although there is some language in the case of *Ormsbee v. Machir*, 20 O. S., 295, which might tend to favor it. On page 306, however, the court substantially adopts the rule asserted by Mr. Benjamin in his work on sales,” viz:

“When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, *if the specific thing is agreed on*, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them in a deliverable shape, or to ascertain the price.”

Now, it will be noted here, as in very many of the cases cited, that the expression is used “where something remains to be done by the vendor,” and it is not stated in this writing whether the weighing was to be done by the vendor or by the vendee. Presumably it was to be done by the vendor, because he was to have the care and possession of the stock, but in the case of

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Parker v. Davis, supra, the inventory was not to be taken by either vendor or vendee, but it was to be taken by them conjointly through the medium of persons chosen by them both, and still the court held that the title would not pass until the completion of the inventory. Judge White, who gave the opinion in *Ormsbee v. Machir, supra*, on pages 306-7, says:

“But in the present case the plaintiffs engaged to deliver the corn at a future time, at a given place, and it was only to be paid for as fast as delivered at that place. The payment and delivery were to be concurrent acts. If there was no delivery, nor what was equivalent to a delivery, there was to be no payment. This consideration, in our opinion, repeals the idea of the property passing to the purchaser at the date of the contract.”

I say that that tends somewhat in the direction of the holding that delivery was essential to the passing of the title as well as the inventory or weighing, but I hardly think that is the rule as generally held by the authorities of this state, or elsewhere. There is a case in the 16th O. S., 509, which seems to hold to the contrary, and without stopping to read through them I might cite for such reference as may be proper the case of *Bellefontaine v. Vassaux*, 55 O. S., 323, and *Bonham v. Hamilton*, 66 O. S., 82. Our judgment is that it is impossible to ascertain by any evidence in the case—it is not apparent from the agreed statement of facts—and in the nature of things it can hardly be ascertained now, what these cattle weighed on the 14th of May. The ascertainment indeed was not to be made as of the 14th of May; it was to be taken at some time between the 15th of May and the 15th of June. It was during that period that the price was to be determined by the weight of the cattle, and nineteen of the cattle were destroyed upon the day before the beginning of the period. The price which was to be paid by George to Gills had already been settled as conclusively as if he had given a promissory note for the amount. In the first part of this contract we have words almost equivalent to a promissory note, except that the time of payment is not quite certain. The time of payment was to be between certain dates, and it was to be at the time of the redelivery of the cattle to

Gills, but there is no other condition annexed to the contract of George that he will pay the \$709.06.

Now, he would be entitled to apply as against the price which he was to pay, whatever might become due from Gills to him upon return of the cattle, but he never in fact returns them. He does not surrender them to Gills; they are not taken back because he is not ready to deliver them. It may be no fault of his; he may have given them the best of care; it may have been an event which he could not help. One of the parties must suffer, and our judgment is that under the rules of law which pertain to a contract such as this, and a transaction such as has been disclosed to us, the loss must fall upon George; he had become the owner of the stock. It does not answer this proposition to say that he had no power of disposition. We think that he had, subject to the right of Gills to sue him for breach of the contract on his part to deliver the stock at the period mentioned. We think that they might have been subject to levy upon a claim against George during this time; that the title was in substantially the state in which it would have been if the herd had belonged to George in the first instance, and he had made the kind of a contract which he makes in the second part of this agreement with Gills. He was the legal owner of the stock. He made a contract that at a certain time he would sell so many cattle, for a price to be ascertained by weight, to Gills, and before that time arrived, and while the stock still remained his property, this unfortunate accident occurred, and we see no way out of the difficulty for him except to suffer the loss, which naturally falls upon him, under all the circumstances. We think that the judgment of the court below, which adopted the other version of this contract, and treated this transaction as a bailment, should be reversed, and under the agreed statement of facts and the pleadings, that a judgment should be entered in this court accordingly. It is, therefore, entered for the plaintiff, Gills, in the sum of \$709.06, and interest.

James O. Troup, for plaintiff. .

Baldwin & Harrington, for defendant.

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RIGHTS UNDER SALE ON EXECUTION.

[Circuit Court of Lucas County.]

ANTON WARNS V. JENNIE REECK.

Decided, February 19, 1905.

Sale on Execution—Questions on Distribution—Rights of Purchaser—Where Execution was Levied Between Date of Purchase and Delivery of Deed—Homestead Exemption—Set-off—Costs.

1. Where a creditor obtains judgment and levies execution on property of the debtor during the interval between the sale of the property by the debtor and execution of a deed and its delivery, the purchaser will be entitled, on distribution of the fund arising from the sale on execution, to the protection of the court to the extent of the amount he paid down at the time the contract of sale to him was made.
2. An agreement, entered into at the time of the contract of sale, whereby a note against the seller and held by the purchaser was to be surrendered as a part of the payment to be made at that time, will be treated by the court as fully executed, notwithstanding the note was not as a matter of fact surrendered until the day the deed was delivered.
3. The judgment debtor does not in such a case lose his right to homestead exemption.
4. Costs will be adjudged against the judgment debtor up to the time he made his application for an allowance in lieu of homestead; costs made thereafter must be paid by the execution creditor.

HULL, J.; PARKER, J., and HAYNES, J., concur.

This action was brought by the plaintiff to sell a certain piece of real estate in the city of Toledo, upon a judgment which he had recovered on a promissory note. The plaintiff asks to have the property sold, the liens marshalled and this claim paid out of the proceeds of the sale. The judgment was recovered against William Leck, who was the owner of this property and in whom the legal title was at the time the judgment was recovered. The controversy arose out of the fact that before the judgment was recovered, Leck, the then owner of the property, by a valid contract, had sold it to the defendant, Jennie Reeck, through her husband, who was acting for her, but the deed for the property was not executed until two or three days after the judgment was recovered and execution levied in this county.

The facts, briefly, are these: William Leck was the owner of this property; he was indebted to Warns on a cognovit note in the sum of about \$400. On the first day of September, 1903, Leck made a contract with Herman Reeck to sell him this property for \$1,650. On the 3d of September Warns went to Cleveland and took judgment on his cognovit note against Leck for \$406.35, and had that entered upon the foreign execution docket of this county on the same day, and probably on the next day, September 4th, Warns, through his attorney, gave a written notice to Reeck that he had recovered this judgment and that it had been entered upon the foreign execution docket of this county, it not having been indexed by the sheriff. On September 5th, the next day after this written notice had been given to Reeck, he, Herman Reeck, who was doing all the business, took a deed to the property in the name of his wife, Jennie Reeck. Herman Reeck and Leck met in a notary's office and the deed of the property was made by Leck to Jennie Reeck; and soon after that this action was commenced by the plaintiff to sell this property upon his judgment and Leck was made a party. These facts are substantially admitted; there may be some little difference, but it is not material. Leck, who was made a party, set up a claim for \$500 in lieu of a homestead out of the proceeds of this property; and the question is as to the rights of these parties under these facts.

It is claimed that Leck has no right to the exemption; and it is also claimed that in any event this judgment lien of the plaintiff is superior to any right of homestead under these circumstances.

As we understand the law as laid down, especially in the 20th Ohio St., 68, and 15th Ohio, 569, Reeck, who purchased the property, is entitled to protection to the amount that was paid down when this contract was made; that the judgment not having been recovered until after the contract had been made, the parties had the right to go on and execute the conveyance, although they knew that the judgment had been recovered and execution had been levied. It was held by the Supreme Court that the purchaser is entitled to protection for the amount he has paid down, and that a contract having been made between the parties which could be enforced by action in specific per-

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formance, they may go on after the judgment has been recovered and execute the conveyance, as these parties did here.

A question of fact arises between the parties as to the amount that was paid down. It is admitted that \$50 was paid down on the day that the contract was made, the first of September. Reeck held a note against Leck for \$100, and it is claimed that this \$100 note was also turned over to Leck on the day the contract was made, or that it was agreed that it should be turned over, and that the note has either been lost or destroyed; and it is claimed that Reeck is entitled to protection to the amount of the one hundred dollar note also; so that he should be found to have paid down \$150 instead of \$50. The original contract was drawn up by a notary by the name of Kranz; he testifies that he saw nothing of the note at the time the contract was made; and we are satisfied from the evidence that the note was not produced at that time, and was not delivered or turned over by Reeck to Leck on the first of September, the day the contract was made, and not until the 5th; but that it was contemplated between the parties that this note should be a part of the purchase-money—that it should be turned over by Reeck as part of the purchase-money; of this we are perfectly satisfied, and it is almost inconceivable that it should be otherwise. Leck was insolvent; there was on this property a large number of liens which Reeck assumed as part of the contract, running up to over \$1,200. The purchase-price was only \$1,650, and it was apparent that Leck was insolvent; and we think there is no question but at the time this contract was made, it was understood that this note should go in as part of the purchase-money. But we think from the evidence that it was not actually turned over to Leck or destroyed until the 5th of September, the day the conveyance was made.

It is claimed by counsel for plaintiff that if this is true, that it can not be considered in this transaction in favor of Reeck. But we are of the opinion that Reeck had a right to set this note off, would have the right to set it up and set it off against Leck's claim for the purchase-money. The judgment creditor can get no greater right here than Leck had as to this purchase-money. His only right is to step into Leck's shoes and insist that the money that was coming to Leck should be applied

toward his claim. Reeck's claim against Leck on this promissory note was a debt upon a contract which he would have the right under the statute, Section 5071, to set off against Leck's claim for the balance due on this purchase-money; and that being true, we think that it should be considered in any event as a part of the down payment, and should be deducted from the amount of the purchase-price, to-wit, \$1,650, and that would cut the amount down to \$1,500 still due upon this contract.

Warns' claim here is only for the balance of the purchase-money still due; he has no lien upon the land, except to secure that; that is, that portion of the balance of the purchase-money that can be appropriated to the payment of his judgment. These other liens, as I say, are ahead of his and amount to something over \$1,200.

The question as to whether Leck was entitled to a homestead out of this or not, under the circumstances, was considered by this court upon a demurrer. The demurrer was overruled, the court holding, under these circumstances, Leck was entitled to claim \$500 in lieu of a homestead, and we still adhere to that opinion. He has done nothing so far as we can see that deprives him of his right to a homestead exemption; he has sold his property, his homestead; this was his homestead, and he has no property except what was coming to him out of this purchase-money. Homestead acts are construed very liberally, and it seems to us that he comes very clearly within the provisions of the homestead and exemption statutes of this state; that he is within Section 5441, under which he has a right to property, real or personal, to the amount of \$500, in lieu of a homestead. All Leck has in the world is this balance due on this purchase-price, this credit or choses in action. That statute, Section 5441, the Supreme Court has held, is to be construed to cover money or credits which are held to be personal property. The court say, in *Chilcote v. Conley*, 36 O. S., 545, after stating the facts briefly:

“‘Personal property,’ construed in connection with other statutes *in pari materia*, includes credits and moneys selected by the debtor. Credits and moneys selected by the debtor can not be taken and held under an order of attachment or by garnishee process.”

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And in the opinion which was delivered by Judge McIlvaine, on page 548:

“This provision should be liberally construed and with the purpose of placing all debtors of the class upon a footing of equality. Hence personal property, as in Section 37 of the Justices’ Act, should be held to include ‘money’ and the phrase ‘exempt from execution or sale’ should be construed to mean, in the language of Section 30 of said act, ‘exempt by law from being applied to the payment of the plaintiff’s claim.’ ”

This proceeding here is in the nature of an attachment or garnishment of this money. The judgment creditor has lost his right to the land, except to have a lien upon it to secure the balance of the purchase-money—the balance of this purchase-money which is coming to Leck; and Leck would be entitled to \$500 of the money, if there was that much remaining after payment of liens, as an exemption in lieu of a homestead. It is impossible for us to see why he is not entitled to this exemption under the statute.

The decree, therefore, must be against the plaintiff; there is nothing in this property or in the purchase-money still due to be applied upon his claim. There were several attempts made to settle this matter between the parties, but there was never anything done that amounted to a formal tender between Reeck and Leck, and that is not material here.

We find, therefore, that the balance of the purchase-money should be paid into court by Reeck, to be applied to the payment of these liens in their priority down to Leck’s claim for homestead, and then what is left, which will be less than \$500, should be turned over to Leck in lieu of his homestead, which will leave nothing for the plaintiff.

As to the costs, they will be adjudged against Leck until the time that he made his demand for a homestead, and those accruing since then will be charged against the plaintiff, as the issues have all been decided against him, including the homestead matter. Although Leck gets a portion of this money, judgment for costs can not be enforced against him out of his homestead exemption, as we look at it, but he ought to pay what has been assessed against him. The petition of the plaintiff will be dismissed.

MR. SCHAAL: We had some trouble with the costs in the court below; I want to understand now whether Mr. Reeck has to take care of the payment of any of these costs, or whether they are to be paid out of the money coming from Leck?

THE COURT: We are of the opinion that Reeck ought not to pay any costs. He has been ready at all times, the testimony shows, to pay into court the balance of the purchase-money and let it be applied as the court might direct, and is still ready and willing, and now offers to pay the balance of it.

F. E. Rheinfrank, for plaintiff.

F. C. Schaal and *B. F. Brough*, for defendant.

EQUITIES BETWEEN LESSEE AND SUB-LESSEE.

[Circuit Court of Hamilton County.]

PATRICK J. MCHUGH v. CATHERINE REGAN, ADMINISTRATRIX.

Decided, July 28, 1906.

Lease—Privilege of Purchase—Eviction—Breach of Covenant—Of Quiet Enjoyment—For Payment of Taxes—Set-off—Waiver.

1. A sub-lessee, with a privilege of purchase, who loses this privilege and is compelled to attorn to the owner, because of the failure of the lessee to renew the lease or exercise his own privilege of purchase, suffers a breach of the covenant for quiet enjoyment and is entitled to any damages he may have sustained by reason of eviction from his privilege.
2. A previous breach by the sub-lessee of a covenant for payment of taxes does not afford a ground of action against him by the lessee, where every circumstance surrounding the matter indicates that the forfeiture of the estate for non-payment of taxes was waived.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The facts in this case, briefly stated, are as follows:

John L. Whetstone, the owner of certain real estate, leased the same to John Regan, now deceased, for a period of five (5) years, from May 1, 1896, with the privilege of purchase during said period for \$4,000. John Regan leased said property to P. J. McHugh for a period of ten years from May 1, 1897, with the privilege of purchase at any time during the continuance of the lease for the sum of \$6,000.

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John Regan failed to exercise his privilege of purchase during the term of his lease and failed to renew it at its expiration, and was therefore unable to carry out his agreement with McHugh. McHugh continued to pay rent to the plaintiff below, as administratrix of John Regan, deceased, until about November, 1901, several months after the lease from Whetstone to Regan had expired. About August 13, 1901, McHugh received notice from Mr. Whetstone's agent that Regan's lease had expired, and that he, McHugh, continued in the premises only with Whetstone's consent. And on November 1, 1901, he received a second notice from Whetstone's agent that all moneys for rental of the property must be paid to him, beginning on that date.

Mrs. Regan, the plaintiff below, demanded rent of McHugh on November 1, 1901, when he told her of the notice from Whetstone, and that thereafter he would pay rent to him, which he did at the rate of \$35 per month. The rental under the lease from Regan to McHugh was at the rate of \$25 per month, and the payment of all taxes upon the premises. McHugh failed to pay the taxes for the years 1899 and 1900, for the recovery of which this action was commenced.

McHugh, by way of cross-petition, claims damages in the sum of \$1,500 by reason of the loss of his privilege to purchase the premises for the sum of \$6,000.

The case was tried before a jury, and at the conclusion of the evidence, the court, upon motion of the plaintiff, dismissed the cross-petition and instructed the jury to return a verdict for the amount claimed in the petition, which is the error complained of.

It is plain that Regan could not perform the covenants of his lease, which was in the ordinary form, unless he exercised his right to purchase the premises prior to May 1, 1901, which he failed to do. The only alternative left to McHugh, after that day, was to pay the rent to Whetstone upon his terms, or vacate the premises. This, of itself, was an eviction, and entitled McHugh to set off against the claim of the plaintiff for unpaid taxes any damages he sustained by reason of such eviction and the consequent loss of the right to purchase the premises at \$6,000. In the Am. & Eng. Encyc. of Law, 2d Ed., at page 482, the law is stated as follows:

“It is not necessary that the tenant be actually and physically removed from, or should leave the demised premises, for, in the absence of fraud or collusion on his part, he is evicted where he attorns to the holder of the paramount title and takes a new lease from him under pressure of a possessory writ or threats of expulsion.”

In the case of *Holbrook v. Young*, 108 Mass., 83, the first proposition of the syllabus is as follows:

“A let a shop to B as tenant at will, who under-let it by a written lease to C. A demanded the rent from C, and said that unless he paid the rent to him and took a lease from him, he must leave. C paid the rent to A and took the new lease. *Held*: In an action by B against C for rent, that there had been a breach of the covenant for quiet enjoyment in the lease from B to C, for which C could recoup.”

Substantially the same principle is announced in the case of *Lanc v. Furry*, 31 O. S., 574. It is very clear, therefore, that McHugh, through no fault of his, was compelled to pay the rent to the real owner of the premises or quit the same. It is suggested, however, that prior to the expiration of the lease from Whetstone to Regan, that McHugh had failed to pay the taxes for which this suit is brought, and that thereby he had forfeited his lease.

There is no doubt that, under the terms of the lease, the same might have been foreclosed for such non-payment, had the lessor so elected. Neither Regan nor his administratrix ever insisted upon a forfeiture, but, on the contrary, demanded and received the monthly rent from McHugh until about November 1, 1901, when he commenced paying rent to the owner, Whetstone. Every circumstance surrounding the transaction indicates that the forfeiture of the estate for non-payment of taxes was waived. *Chaffee v. Foster*, 52 O. S., 358.

We are of opinion, therefore, that the defendant was entitled to have the issue raised by the cross-petition submitted to the jury, and that the court erred in sustaining the motion of the plaintiff. Judgment reversed, and cause remanded for a new trial.

Chas. J. Hunt and O. W. Bennett, for plaintiff in error.

Frank M. Coppock, contra.

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**INJURIES INFLICTED BY SERVANTS WITHIN THE SCOPE OF
THEIR EMPLOYMENT.**

[Circuit Court of Lucas County.]

**THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY v.
JOHN B. KLUTE.***

Decided, January 30, 1905.

*Torts by Servants—Presumption as to Their Being Employes—And
Acting Within the Scope of Their Employment—Evidence of Acts
Immediately Subsequent to the Injury—Questions for the Jury—
Punitive Damages.*

After controversy between a municipality and a railroad company relative to the right of the company to lay tracks across ground claimed as a street, a car loaded with material for track-laying, and accompanied by fifteen or twenty men, emerged on Sunday afternoon from the company's warehouse and was pushed down to the point of the disputed crossing, where the plaintiff, a policeman, was stationed to prevent the laying of the track. The work of unloading the car began against the policeman's protest, and while attempting to arrest one of the men, and after a command by one in charge to throw the ties on the policeman if he did not get out of the way, he was struck by a tie and injured. *Held:*

1. That in the absence of evidence to the contrary the facts were sufficient to warrant the jury in finding that the men were employes of the railroad company, and that they were acting under orders from the company in attempting to lay the track.
2. That in throwing a tie upon the plaintiff these men were, under the circumstances, acting within the scope of their employment and authority.
3. That evidence of acts on the part of the men immediately subsequent to the injury of the plaintiff, including the pushing with a locomotive of a car over the end of the rails into the street for the apparent purpose of obstructing the street, was properly admitted as a part of the *res gestae*.
4. That it was a case where punitive or exemplary damages were properly included.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought by Klute, a policeman, to recover damages which he sustained at the hands of employes of the

*Affirmed by the Supreme Court without report, December 12, 1905.

railroad company. His claim is that at the time he was injured the employes of the company referred to were acting under the authority and directions of the company within the scope of their employment, and that they maliciously and willfully injured him, while so acting, and he therefore brought this action for damages.

The injury occurred on July 5th, 1903. On that day, and for some time prior thereto, there had been a controversy going on between the city of Toledo and the railroad company in regard to a certain street, or alleged street, in Toledo, on the east side of the river, called Wilmot street, the city claiming that the street had been projected through the territory at that point, and the railroad company denying that such was the fact. For some time prior to July 5th, 1903, the railroad company had been threatening to lay a track across this street, and policemen had been stationed there from time to time to prevent this, and on the morning of the 5th, which was Sunday, Klute, under orders from his superior officer, took his station under a bridge near this point, where it was thought that the railroad company contemplated laying a track across the street. At about 2:30 or 3 o'clock in the afternoon the work of laying the track commenced, out of which the trouble arose.

At the close of the testimony for the plaintiff a motion was made to direct a verdict for the defendant. This was overruled; and thereupon the railroad company announced that it did not desire to offer any evidence. The case then went to the jury on the testimony offered by the plaintiff, and a verdict was returned in favor of Klute for damages.

The case involves the question as to whether what the men did in the way of injuring the plaintiff was within the scope of their employment, and, in the first place, whether they had any authority to do the work they were doing. It is claimed by the plaintiff in error that the court erred in not directing a verdict for the defendant upon the motion, and there are some other points in the case.

There is no positive evidence—no witnesses testified that the men who were at work doing this work were ordered by the railroad company to do it, or that they were in fact in the em-

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ploy of the railroad company; but while Klute was at his station under the bridge, a car with some fifteen or twenty men came out of the railroad company's warehouse, which was near, apparently railroad men, and started with the car, pushing it, and the car was loaded with rails and ties and plates and spike-mauls. With the car so loaded, they started down the track toward this street, fully equipped to lay the track, and apparently in the employ of the railroad company. They came out of the warehouse as railroad men would, and there was every indication that they were employes of the company, and when they reached the street, they began the work of laying the track across it.

We think that, in the absence of any evidence to the contrary, the facts were sufficient to warrant the jury in finding that the men were employes of the railroad company, and had been ordered to do this particular work. This was on Sunday, and the work was being done with railroad tools and equipment in the ordinary way, and they were permitted to continue without any interference on the part of the railroad company or its officers. They went to the street and there began to unload rails and ties and to build the track, and before they stopped they got half-way across the street. We think the evidence was ample to raise a presumption that would need to be overcome by evidence that these men were doing what they did under the direction and authority of the railroad company. It is hardly to be supposed that a gang of men of the number of fifteen or twenty would go to the railroad warehouse and start out on Sunday afternoon to perform this work unless they had been hired to do it and had authority.

But it is said that the injury to Klute was not, in any event, within the scope of their authority, or of their employment; that if they injured him they stepped outside of their employment entirely, and that, therefore, the railroad company is not liable. It is well settled in this state that an employer may be liable for the willful and malicious acts of an employe, if he is within the scope of his employment. In *The Nelson Business College Company v. Lloyd*, 60 Ohio St., 448, the first paragraph of the syllabus is:

“An employer is liable for the willful or malicious acts of his servant done in the course of the servant’s employment.”

In the opinion many authorities are cited as to the growth of this doctrine and of its establishment, and the whole question is discussed by the judge delivering the opinion. I will come back to this case later, on some other points in the case.

Was this in the scope of their employment—this injury of Klute? The testimony shows that Klute came out into the street as soon as he saw this demonstration and ordered the men to stop. He was in the full uniform of an officer, including his helmet and badge. He ordered them to stop, and told them he was there to prevent them from doing this work; that if they did not desist he would be required to arrest them. They paid no attention to him. Assuming, as I do, that they were acting under the authority of the railroad company in laying this track, they continued with the work they had been directed to do, and Klute undertook to stop them, but without success. Finally he took hold of one, and pushed him a little beyond the car. There were some men on one side of the car and some on the other side pulling the car, others were pushing it, and, after the car stopped, they commenced pulling the ties off. One of the men on the other side of the car, apparently in authority—there were two men there who appeared to be in authority, O’Brien, who was section foreman, apparently, and Tomkins, who was called a yardmaster—called out “Why don’t you get these ties off?” and they answered “We can not, the policeman is in the way.” The same man replied “To hell with the policeman; if he doesn’t get out of the way, throw the ties on him.” About that time Klute was in a struggle with one of the men; he had his back turned to the car, and just then a tie struck him in the back, injuring him quite severely.

These men apparently had been directed to go out and lay that track across that street. The railroad company understood very well that the city objected to their laying the track. The controversy had been going on for some time. Sunday had been selected as the day for doing this work, other than on a weekday, perhaps on account of the difficulty of securing injunctions, etc. These men were in charge of two men, and obeyed their

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orders; they paid no attention to the policeman when he told them to desist and threatened them with arrest; he was at the time interfering with the unloading of the ties and the building of this track; and the men were ordered if he got in the way to throw the ties on him; and they did throw a tie on him; at least, that is the claim of the plaintiff.

We think there is sufficient evidence to show, in the absence of anything to the contrary, that in throwing this tie on Klute under these circumstances, they were acting within the scope of their employment and authority; and it is a fair presumption, from all these demonstrations, that they were acting under instructions from the railroad company in attempting to put the track across the street, and paying no attention to the policeman when he got in their way and interfered with the work.

It is said that in the throwing of the tie, it does not appear but that one or more of the men picked up the tie from the ground and struck him in the back, or took it off the car, not for the purpose of carrying on the work, or in furtherance of the work they were doing there, but to strike Klute, and that under such circumstances the act would be beyond the scope of their authority. And it is undoubtedly true, under the authorities, that, if the employe commits an act of violence while doing his work, and goes outside of his work and employment to do it, and it is not necessary in the performance of his work, that in such case the employer is not liable. Although Klute did not see just how this happened, we think the jury were warranted in finding that he was struck in the back by a tie that had just been taken off the car and let fall on his back purposely to get him out of the way. His back was turned at the time, but he was only about a foot away from the end of the car, and about the same distance from the side; he had just had this controversy with the men; he had just heard the order given, if the policeman did not get out of the way, to hit him with the tie, and immediately after that he was struck. All the circumstances and things that were said and done there at the time, we think, indicate that this tie was thrown upon Klute for the purpose of preventing him from interfering with the work; and the evidence was sufficient to sustain the claim that it was done within the scope of the authority of the men.

In the case before referred to, 60th Ohio St., 448, this question is discussed at some length. In this case the plaintiff was in the employ of the business college and was repairing an electric light in a room; the janitor come in to do his work, and the plaintiff, who was repairing an electric light, had a ladder and was standing on it doing his work; the janitor could not complete his duties without the ladder being moved; he requested the electrician to step down from the ladder until he could do his work; the electrician declined to do so and the janitor got angry and shoved the ladder so the man on the ladder fell off and was injured. The court of common pleas took the case from the jury and directed a verdict in favor of the defendant; this was reversed by the circuit court and the Supreme Court affirmed the circuit court, holding that the case should have gone to the jury. In the second paragraph of the syllabus, the court say:

“2. When the act complained of may or may not be, from its nature, in the course of the servant’s employment, and this depends upon the real motive or purpose of the servant in doing the act, it is a question for the jury to determine upon a consideration of all the circumstances adduced in evidence.

“3. In a suit against an employer for an injury caused by the wrongful act of his servant, and the evidence is such that different minds may draw different conclusions from it as to real motive and purpose of the servant in doing an act, apparently within the course of his employment, it should be left to the jury to determine the question, under proper instructions, as to the law; and it is error for the court, in such case, to direct a verdict for the defendant.”

It seems to us that the case at bar is a stronger case to submit to the jury than the Nelson Business College case; and the Supreme Court held that should have gone to the jury. The whole question is discussed very fully in the opinion. There are other cases in Ohio bearing upon the question, as to when the malicious or willful act of the employe should be regarded as within the scope of the employment, and therefore the master liable for such malicious and willful acts.

The case of *Stranahan Brothers Company v. Coit*, 55 Ohio St., 398, is a strong case. Here the employe was selling milk under contract to the Stranahan Brothers Catering Company,

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among others, and his employe, while driving the milk wagon, adulterated the milk with water, and delivered it in that condition; he did this because he had an unfriendly feeling towards his master, a malicious feeling, and wanted to injure him. The master had no knowledge of his doing anything of the kind. But the Supreme Court held that this was done in the course of his employment and within its scope, and that the master was liable in damages for such act of his servant, although done to injure his master.

The case of *The Passenger Railroad Company v. Isaac Young*, 21 Ohio St., 518, is an authority on this general subject and may also be cited.

We think in the case at bar the jury might well find from this evidence that what was done there was within the scope of the employment. These men were apparently determined to build the track across the street in the face of opposition, and, in fact, Tompkins, I think it was, or O'Brien, said to Klute immediately after the injury (and as part of the transaction), that he told his men before they went out that there was a policeman down there, but that as long as he did not interfere with them to do nothing to him; but if he interfered, to hit him with the spike maul; this was just before they came out of the warehouse; and we think it is fair to conclude that it was the intention to lay this track against the protests of the policeman, and against his forcible opposition, if necessary.

That portion of the charge of the court to the jury that they might include punitive or exemplary damages was excepted to. But it seems to be settled that in this kind of a case punitive damages may be included. In *The Atlantic & Great Western Railway Company v. Michael Dunn*, 19 Ohio St., 162, the syllabus is:

“A corporation may be subjected to exemplary damages or punitive damages for tortious acts of its agents or servants done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages.”

And this seems to have stood as the law on this subject ever since.

There was evidence that the plaintiff was also struck with a spike maul on his back after he had been struck with the tie. One of the men, as the plaintiff was walking away, struck him on the back with a spike maul; but any claim for damages on that account was withdrawn by the court from the jury, on the ground that what he did on that occasion was not within the scope of his employment, but that it was purely an assault and battery on Klute, for which the defendant was not liable.

Evidence was admitted as to what occurred after the injury by the tie. It is claimed that this should not have been done. The controversy continued for some time. Klute sent to the central police station for help, the chief of police finally came with other officers, and many things were said and done by the men who were there; some of it was admitted in evidence as part of the transaction, of the *res gestae*, and we think properly so; it was one continuous transaction, and we think this evidence was properly admitted. After other policemen had come and the laying of the track was stopped, some of the men were taken to the police station and soon after that a locomotive drawing a C., H. & D. car came out of the railroad yards—or rather pushed a car out of the yards and across the street so far as the track had been laid until the rails spread, and then shoved the cars over as far as possible on the ground. Evidence of this was objected to, and its admission is claimed to be error, but we think the evidence was admissible. It related to and was connected with the transaction and tended to show that the railroad company authorized the construction of this track across the street, showing that as soon as it was partially constructed they occupied it with a locomotive and a car, and undertook thereby to take possession of the street, and throw a car across it. The locomotive used was a C., H. & D. engine, and we think, as tending to show that this whole matter was authorized and approved by the company, this was competent evidence.

A plat of a portion of the city, showing where this street was located, was admitted in evidence; it is claimed that this was error; but we think it was not. There was a controversy here about the street. It is immaterial for the purpose of this case

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whether the city had the right to open this street or not. It claimed to have the right and had sent an officer to this point to guard the street; and, although this question was not very material, there was no error in admitting the plat.

I think I have covered all the points I need mention. In our opinion, the action of the court in refusing to take the case from the jury was correct; the evidence fully warranted the jury in finding that the men were authorized to build the track across this street; that they were expected to use force, if necessary; that when the plaintiff was struck in the back with the tie, they were acting within the scope of their employment. We find no error in the record. The judgment of the court of common pleas will therefore be affirmed.

Swayne, Hayes & Tyler, for plaintiff in error.

Ralph Emery and C. A. Seiders, for defendant in error.

IMPLIED WARRANTY OF GOODS SOLD.

[Circuit Court of Wood County.]

THE OIL WELL SUPPLY COMPANY V. CHARLES S. DAVIDSON.

Decided, May, 1906.

Warranty—Of a Drilling Cable—Authority of Agent to Guarantee—Set-off—Charge of Court—Usual Course of Trade.

1. Where an article, which is not accessible for examination by the purchaser, is sold for a specific purpose, there is an implied warranty that it is suited for the purpose for which it is to be used.
2. Testimony to the effect that the agent who sold the article was without authority to warrant it, is immaterial in the absence of any notice to the purchaser of such lack of authority.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This action was originally brought by the Oil Well Supply Company in the Court of Common Pleas of Wood County, to recover for a certain bill of goods that had been sold to one Charles S. Davidson, amounting to a little over a hundred dollars. Admitting the purchase of the goods and the fact that

they had not been paid for, the defendant set up by way of set-off, the fact that some time before he had purchased of the supply company a drilling cable at a cost of something over four hundred dollars, it being a cable of considerable length, fourteen or fifteen hundred feet, I believe; and he claimed that at the time he commenced trading with the supply company, he was told by the manager of the store (the manager having made some inquiry as to his financial standing) that if he found anything wrong with any article he purchased, the company would make it right. He states that afterwards, when he went to purchase this cable, the manager said he had not in stock a cable he could stand by or would stand by, but that he had one in another store, a branch store at Findlay. The defendant told him he would take it, and thereupon the manager had it sent to Davidson at a point where he was about to drill an oil well, and Davidson received it. He commenced in a day or two to use it in a well that he had already drilled something like a thousand feet or more deep, and as soon as he commenced to use the rope, it showed that it was of poor quality. It commenced to fray and break, and he had to cut it off at different times, and finally, after using it but a short time, he had to discard it and get another. It appeared to be rotten and certainly was of no practical use to the defendant, and of no value to him except as it was sold as old junk for a few dollars.

By way of reply to the answer of the defendant, the supply company claims that its agents have no authority whatever to warrant the worth or quality of goods; and it also denies that any such warranty was, in fact, made; that if made, the agent had no authority whatever to make it; that it was contrary to and against the direct and positive orders of the company.

The case went to trial and quite a volume of testimony was taken to show that the agents had no authority to make any warranty. Testimony was taken in Pittsburg, in the way of depositions, of the officers of the supply company, and testimony of agents here in the field, showing that there were circulars and letters issued, and a form of contract for the purchase of goods was furnished the agents in which it was stated

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that the company would not warrant any of the goods that were sold, the same being sold upon commission, and not manufactured by them. Testimony was offered on behalf of the plaintiff, and again on behalf of the defendant as to whether there was any general custom in the oil field for the supply stores to warrant the quality of goods, and if the goods failed to be of marketable quality to replace them, and upon that the testimony was quite conflicting.

At the time the agent sold the cable to the defendant, the form of contract that was required by the company was not used, nor was anything said at that time about the warranty of the goods. The only phrase that it is claimed was used by the agent who sold it, was that he had a cable he was willing to stand by, that it was a higher priced cable than some of the others, and the defendant said he would take that cable, and that cable was, in fact, sent him. At the time of the bargain it was not in the store and the purchaser did not see it, the purchase being made in Trombley, Wood county, and the cable referred to by the agent being in Findlay, Hancock county, whence it was sent directly to the defendant in the field where he was then at work.

On this state of facts the court charged the jury fairly and correctly upon the law of the case. The question in regard to the right of the agent to make a warranty turned upon the legal question whether in the usual course of trade and business, an agent of this kind, a general agent, would have the right to make a warranty, and upon that a proper charge was given to the jury.

Another question that was made was as to whether there was an implied warranty as to the quality of the goods, that they should be of good merchantable quality and fairly and reasonably fit for use. One decision cited that we think has some bearing upon the case is that of *Rodgers v. Niles*, 11 O. S., 48. In that case it seems there had been a sale of three boilers by Rodgers & Company to Niles & Company, to be used in certain mills the latter were erecting, and it turned out in using the boilers that they were defective, owing to a defect in the material that went into them. A discussion—it seems to have been a very

able discussion, which was participated in by some of the leading Cincinnati attorneys—was had as to whether there was an implied warranty by the manufacturers against these secret defects, it being contended on the one side that there was, and on the other side that the manufacturers were only bound to use reasonable care in the selection of the material which went into the boilers. The Supreme Court divided on the question, a majority of the court holding that there was such an implied stipulation.

I will read from the opinion by Judge Scott:

“The general rule of common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty. Where the purchaser is not deceived by any fraudulent representations, and demands no warranty, the law presumes that he depends upon his own judgment in the transaction, and applies the maxim ‘*caveat emptor*.’ But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while as to others the authorities can not be easily reconciled. We do not propose an investigation of the subject further than is demanded by the case before us. The principal, if not the sole, exceptions to the rule are found in cases where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased; the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use. Thus, it is said by Mr. Story:

“ ‘When an examination of goods is, from their nature or situation at the time of the sale, impracticable, a warranty will be implied that they are merchantable. Thus, if the goods be at sea, or not arrived; or if they fill the hold of a ship, so that nothing but the surface can be seen; or if they be in bales, so that an examination of the center can not be made without tearing each bale to pieces, the seller will be understood to warrant them merchantable, and of the quality demanded and expected by the buyers.’ Story on Contracts, Sec. 834.

“It is true that the warranty of merchantable quality has, in several cases, been held to be limited to cases where the examination is impracticable, and not merely inconvenient. *Hyatt*

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v. *Boyle*, 5 Gill. & Johns., 110; *Hart v. Wright*, 17 Wend., 267. So, also, the implication of warranty is said not to extend to cases where an examination, though practicable, would be fruitless, on account of the latent character of the defects; but only to those cases in which there can be no examination. 1 Parsons on Contracts, 466. The same writer, however, says:

“ ‘One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should “beware,” or should take care to ascertain for himself the quality of the things he buys, becomes utterly unreasonable under circumstances which make such care impossible.’ ”

Then he cites some cases under the general rule, and says:

“With respect for the doctrine that a sale made for a particular purpose implies a warranty that the thing sold shall be fit for the purpose, it is said in Smith’s Leading Cases, 250, that ‘the sounder view seems to be that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory’; and that, in this case, is not in the nature of a warranty, but of an implied stipulation, forming a part of the substance of the contract.”

The jury returned a verdict in this case in favor of the defendant, Davidson, and we think the verdict should be sustained.

The large amount of testimony that was taken in regard to the notice to agents, which notice was never brought home to Davidson, must be disregarded.

The case stands upon the questions, first, whether there was an express warranty, and upon that the jury found in favor of the defendant, and secondly, whether there was a sale of the article for a specified purpose, and an implied warranty that it was fit for that purpose. Passing the first question, upon which there is a conflict in the evidence, we hold that the vendor is liable upon the implied stipulation. The vendee did not see the cable and had no means of examining it. He told the agent what he wanted, and the agent told him they had the article at the other store and they would send it to him, and we hold that under such circumstances the vendor was bound to send to him an article that was merchantable, and reasonably fit for the use intended.

It is very clear from the evidence that for some reason this cable was of poor quality and really unfit for use—of no prac-

tical use; and we hold that the loss should fall upon the vendor. The judgment of the court of common pleas will, therefore, be affirmed, but without penalty.

I. C. Taber, for plaintiff in error.

Baldwin & Harrington, for defendant in error.

NOTICE OF STREET IMPROVEMENT.

[Circuit Court of Hamilton County.]

WILLIAM G. ROBERTS, ADMINISTRATOR, ET AL V. THE VILLAGE
OF ST. BERNARD ET AL.

Decided, July 28, 1906.

Executors—Are "Owners of the Land"—Upon Whom Notice Should be Served. When—Executor Properly Served—By Notice Addressed to Heirs of the Decedent, When—Section 2304.

1. Executors under a will which directs them to hold and manage real estate for a term of fifteen years, pay the taxes, etc., and at the end of said term sell and convey the same and distribute the proceeds of sale, are the "owners of the land" upon whom service of notice should be made, under the statute providing for street improvements.
2. An executor of a will, residing in the county and entitled to a written notice of the adoption of a resolution providing for a street improvement, is bound by a notice addressed to the heirs of the testator, where it appears that the notice was left at his residence, and was actually received and examined by him and was submitted by him to his attorney.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

This action was commenced to restrain the collection of certain street assessments levied upon the property of the estate of Noah Babbs, deceased, and of the grounds relied upon, we deem it unnecessary to consider any except, first, that the executors of the last will and testament of Noah Babbs, deceased, were not the owners of land upon which the assessment was levied within the meaning of Section 2304, Revised Statutes; second, if there were such owners, they were not served with notice, as required by that section.

Item third of the last will and testament of Noah Babbs, deceased, whereby the real estate in question was disposed of, is as follows:

“Item Third. I order and direct that my real estate in Hamilton county, Ohio, consisting of two farms, one of forty-five acres in Springfield township, and the other of thirty-two acres in Millcreek township, be held by my executors for the term of fifteen years from the date of my decease, and at the expiration of the said term of fifteen years, I order and direct that said real estate be sold by my executors and converted into money, and the proceeds of the same, after deducting expenses, I give and bequeath to the following named persons, viz.: To my son, William Babbs, one-sixth; to my son, John Babbs, one-sixth; to my daughter, Emeline Stratton, one-sixth; to my daughter, Delia Virginia Voorhees, one-sixth; to my stepson, Sylvester Ralston, one-sixth, and to my grandchildren, Bell Babbs and Charles Babbs, children of my deceased son, Charles Babbs, one-sixth, to be equally divided between them, and shall be distributed to them, my said legatees, by my executors as the same comes into their hands.

“During said term of fifteen years, I order and direct my executors to manage and control said farms for the best interest of my estate; to lease and rent the same from time to time, on such terms as they may see proper, collect the rents and profits thereof, and out of the same pay taxes and necessary repairs, so said property shall be kept from suffering waste, using their judgment in said matter, and deducting such expenses and the expenses of the management of the same, the balance of such rents and profits they shall distribute among my said legatees, named in this item, in the same manner as provided for the distribution of the proceeds of the land when sold, and they will distribute such rents as they conveniently can after being received by them; provided, however, if my executors desire to use any part of the income of said farms to pay the annual sums to my wife named in the second item of this will they are directed to do so.”

It is plain from this provision of the will that the executors were vested not merely with a naked power to sell the land and distribute the proceeds, but that it was coupled with an interest in and control over the land itself. In the case of *The Lessee of Boyd et al v. Joseph Talbert*, 12th Ohio, 212, the first proposition of the syllabus is as follows:

“If a testator bequeath to his wife all his estate, real, leasehold and personal, and all moneys and proceeds which may arise from the same, and direct his executors to lease certain premises, and after paying ground rents and taxes, pay the proceeds to his wife, the title to the premises is held by the executors.”

And in the case of *The Lessee of Williams et al v. Veach et al.*, 17th Ohio, 171, the syllabus is as follows:

“Where, in a will, the testator confers powers upon his executors, in form following: ‘Giving them full and complete power as I myself possess, after my decease, to dispose of all my estate, real, personal and mixed, in the way and manner which they may think best calculated to carry into effect all all the purposes specified in this, my last will and testament, except that no part of my estate shall be sold at public sale,’ it is a power coupled with interest, and will be so construed, if the other parts of the will seem to require it, in order to carry out the intention of the testator.”

The facts in the case before us bring it within the principle announced in these cases, all of which may be distinguished from the case of *Elzner v. Fife*, 32 Ohio St., 358, as pointed out by Day, J., at page 369. We think, therefore, that the executors were the owners of the land upon whom service of notice should be made under the statute.

Was the notice legally served upon the executors? One of the executors resided in Indiana and the other upon the land assessed. There being no newspaper published in the village of St. Bernard, written notices of the resolution declaring the necessity of the improvement were posted in twelve (12) public places in the village, which is the only way provided by the section for service upon a non-resident. A proper notice in writing was left at the residence of the executor living in Ohio addressed to “Noah Babbs’ Heirs,” but was in fact received by such executor, and by him submitted to his attorney. Notice should have been addressed to the executor, but having received a notice containing all the facts required by the statute, and having submitted the same to his counsel, the executor received all the information required in the notice by the statute, and is bound thereby, as he had an opportunity to be heard and to protest or submit objections to the work if he so desired.

A like decree to the one rendered by the court below may be entered in this court.

William G. Roberts and *David Davis*, for plaintiffs.

Samuel B. Hammel, for defendants.

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**IMPROPER JOINDER OF MASTER AND SUPERINTENDENT IN
ACTION FOR WRONGFUL DEATH.**

[Circuit Court of Lucas County.]

**ROBERT V. FRENCH, ADMINISTRATOR, v. THE CENTRAL CON-
STRUCTION COMPANY ET AL.**

Decided, June 16, 1906.

*Joinder of Parties—Master and Superintendent can not be Joined,
When—Misfeasance of Servant—Doctrine of Respondeat Superior
—Election Between Parties—Final Order—Pleading—Procedure—
Dismissal—Sections 6707 and 5314.*

1. An order which determines the particular action pending is a final order, notwithstanding it does not determine the right of action involved.
2. The wrongful death of a servant, due to the misfeasance of the superintendent under whom he was employed, does not afford ground for a joint action against the superintendent and the master, but may be made the basis of an action against the superintendent for his negligent act or against the master under the doctrine of *respondeat superior*; and where the action has been brought against both jointly, the plaintiff may be required to elect against which one the cause shall proceed.
3. Where the master is a corporation, and has no office or place of business in the county where the tort occurred, and suit thereon has been brought against the master and superintendent jointly, and the evidence has disclosed that the liability is not joint, the master may be dismissed on its own motion, or the plaintiff may be required to elect as to which defendant he will proceed against, and in the event of his refusing to elect the action may be dismissed.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

The action in the court below was by the plaintiff in error against the defendant in error, and was to recover on account of the death of the decedent, which was charged was caused by the negligence of the defendants. The issues were made up, and after evidence had been introduced on behalf of the plaintiff and the plaintiff had rested his case, the following action was taken, as set forth in the journal entries:

“The plaintiff having introduced all his evidence, and having rested his case, the defendant, Edward S. Hatch, moved the court to require the plaintiff to elect as to whether he would prosecute this action against the said defendant Hatch, or against the defendant, the Central Construction Company.

“Upon consideration of the said motion, the same was granted by the court and the plaintiff was ordered and directed to prosecute his action against either the defendant, Hatch, or the defendant, the Central Construction Company, and was denied the right to prosecute the same jointly against the defendants hereto, to which action of the court the plaintiff then and there duly excepted, and with which order of the court the plaintiff then and there refused to comply, and requested that the case be submitted to the jury, which request was denied, to which the plaintiff excepted.

“Thereupon, by reason of the failure of the plaintiff to comply with the said order, the court withdrew a juror and dismissed this action. To all of which the plaintiff duly excepted.

“This action is dismissed solely upon the refusal of the plaintiff to comply with the order of the court requiring him to elect which of said defendants he shall prosecute herein, and not upon the merits of the plaintiff's cause of action.”

Thereafter certain other steps were taken in the case in pursuance of an effort of the plaintiff to have a new trial and to obtain leave to file an amendment to his petition, which we need note particularly.

Plaintiff in error complains of this action on the part of the court, but on behalf of the defendants in error it is contended that error does not lie to reverse an order of this kind; that it is an order made in pursuance of clause 5 of Section 5314 of the Revised Statutes, to-wit, “By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action”; that the dismissal is without prejudice, and is simply in the nature of a penalty for the disobedience of the court's order in the premises, and is not such a final order or judgment as that error lies to it.

Section 6707 provides that “an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment” is a final order which may be vacated, modified or reversed. We think that means an order which in effect determines the particular action pending, not

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an order which necessarily determines the right of action, and that when a court, against plaintiff's protest, dismisses his action so as to prevent a judgment in that particular action, if the action of the court is not warranted by the law, its reversal may be obtained by proceedings in error. *Evans v. Iles*, 7 O. S., 233.

It is agreed by counsel that the action of the court in requiring an election was based upon the opinion of the court that the cause of action stated in the petition was not joint as against the Central Construction Company and Edward S. Hatch, but was several as against one, or perhaps both. It is also agreed that the real purpose of the motion on behalf of defendants upon which the court made this order was to put the matter in such shape as that if the plaintiff should elect to proceed against the Central Construction Company, then a motion might be made to dismiss his cause as to that company, for the reason that the court had no jurisdiction over its person; at least, jurisdiction over its person had not been rightfully obtained.

The petition, and the record otherwise, discloses that the Central Construction Company is a corporation organized under the laws of the state of Ohio, having an office and place of business in Medina, Medina county, Ohio, and it is averred in the petition that it also has a place of doing business in Lucas county, Ohio. Mr. Hatch was a resident of Lucas county. Upon the petition being filed, a præcipe was filed for summons for each of the defendants, to be directed to the sheriff of Lucas county; also a summons for the Central Construction Company, to be directed to the sheriff of Medina county. Service was made upon Hatch in Lucas county, and upon the construction company, reading from the return, "by delivering to Edward S. Hatch, managing agent of said company, a true and certified copy of this writ with endorsements hereon. The president, chairman or president of the board of directors, cashier, treasurer, secretary and clerk, and all other officers and agents of said company, could not be found by me in Lucas county, Ohio." That is a part of the return upon the summons issued to the sheriff of Lucas county. It appears from the record that upon motion of the construction company this service was set

aside, upon a showing that Hatch did not occupy this position in the company, and that the company did not have an office and place of business in Lucas county, Ohio. Thereupon summons was sent to the sheriff of Medina county, Ohio, and was served on the Central Construction Company there.

As the petition stood, with the averment in it that the construction company had an office and place of doing business in Lucas county, Ohio, the construction company could not raise the question of jurisdiction over its person by demurrer to the petition, for the statute provides that a corporation may be sued in any county in the state where it has an office and place of doing business. So it appears that in order to present this question of jurisdiction the construction company was required to and did answer; and in the opening paragraph, it says this: "Now comes the Central Construction Company, one of the defendants herein, and protesting that this court has not obtained jurisdiction over the person of the defendant, files this, its answer to the plaintiff's petition herein." Then follows its answer to the merits.

It has seemed to the parties, and it is perhaps true, that it could not be made clearly manifest whether this was a joint cause of action or a several cause of action, until after the plaintiff's case had been developed by the testimony introduced on his behalf. The court and counsel seem to have proceeded upon that theory, and therefore, after the evidence was all in, the action which I have mentioned respecting election was taken, with the purpose of presenting this question to the court.

Now, it appears from the evidence that if the construction company was liable at all on account of the negligence charged against Hatch, it was so liable under the doctrine of *respond-eat superior*. The construction company was building a bridge across the Maumee river at Grand Rapids, Ohio. Hatch, in the employ of the construction company, was superintending the building of the bridge. March was an employe of the construction company, and was at work upon the bridge. Hatch was his superior. By an alleged negligent act done by Hatch personally, or by his direction, or under his supervision, a part of the apparatus which supported March while at work.

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was disarranged, and, as a consequence, March fell to the river on the rocks beneath and was killed. This the evidence at least tends to show. The construction company had not directed Hatch to do this particular thing. The construction company was not in the position of an employer who was present directing the particular act complained of. It was a corporation; it was absent. The authority of Hatch and the directions to Hatch, were general, to superintend the work. So that I say it appears that if the construction company was liable at all it was liable under the doctrine of *respondeat superior*; because of the negligence of its servant, Hatch; and solely because of his misfeasance.

Under such circumstances, as we understand the law as laid down by the Supreme Court of this state, the cause of action is not against Hatch and the construction company jointly. Assuming that what the evidence tends to show is the true state of affairs, we are of the opinion that it would constitute a cause of action against Hatch on account of his wrongful and negligent act, and also a cause of action against the construction company under the doctrine of *respondeat superior*, but not against them jointly. This we understand to be the doctrine of the case of *Clark v. Fry*, 8 O. S., 358. The question of whether this would constitute a cause of action against Hatch at all has been discussed, but we do not regard the decision of that question as being necessary here, though I have already intimated the opinion of the court upon it; that is, that this is not a mere non-feasance upon the part of Hatch, in which case there would be no cause of action against him in favor of the estate of March, but it is a misfeasance, accompanied by a physical act on the part of Hatch, resulting in the injury to March, and therefore, giving rise to a cause of action against Hatch.

In the case of *Clark v. Fry*, *supra*, Freeman was the employe of Clark in the digging of a cellar upon certain premises owned by Clark, and an area at the front thereof extending into the street. This excavation within the lines of the street was not sufficiently guarded, and Fry, a pedestrian on the street, fell

into the excavation and was injured. Fry brought action against both Clark and Freeman and judgment was obtained against both. Clark prosecuted error; the judgment against Freeman was allowed to stand without question. It did not appear in that case that Clark was personally present, directing the work being done by Freeman, and therefore, it appeared, and was held, that if Clark was liable at all, he was liable only under the doctrine of *respondet superior*. In discussing the matter, Chief Justice Bartley has this to say, reading from page 377:

“But whether the liability to the defendant in error, if any existed, attached to Freeman alone, or to Clark for the negligence of his servant or agent, or to Clark and Freeman, as joint tort feasons, depended upon a legal question arising upon the relation between Clark and Freeman in respect to the transaction alleged as the occasion of the injury. If the excavation had been *ipso facto* unlawful as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrong-doers. But if there was nothing in the work that Clark had required by the contract to be done which was in itself unlawful, or which, properly done, could be the occasion of an injury to anyone; and Freeman, wholly free from the control of Clark as to the manner of doing the work, had, by his own wrongful and negligent conduct, been the cause of the injury, he alone would be liable. If, however, Freeman, acting under the control and direction of Clark, as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly with Freeman. In this last instance supposed, either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons v. Winchell*, 59 Mass., 592; and it appears to rest upon a reason which is entirely satisfactory.”

Judge Bartley does not mention what that reason is, but we have taken occasion to examine the case of *Parsons v. Winchell*, *supra*, and it seems to us that the reason stated is one that had its

foundation in the common law practice. Whether it obtains now seems to us doubtful, but the case of *Clark v. Fry, supra*, has not been overruled or questioned by our Supreme Court, and it has been followed by the lower courts of this state in a great many cases. We find one case reported, the case of *Seelen v. Ryan*, Cincinnati Superior Court Reports, at page 158, and it is cited with approval by the Circuit Court of the United States for the District of Kentucky, in the case of *Warax v. The Cincinnati, N. O. & T. P. Ry. Co. et al*, reported in 72 Federal Reporter, 637. The opinion in that case is by Judge Taft. He says, in the course of the opinion, "The cases which support the view that the master can not be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in the negligence, either by his presence or express direction, are as follows," and then follows the citation of a number of cases, including the case of *Clark v. Fry, supra*.

The syllabus in *Warax v. Railway, supra*, distinctly upholds the contention of counsel for the defendant in error. I read the second and third clauses:

"2. When the engineer of a railroad train starts such train without giving warning, while he knows, or ought to know that a switchman is between the cars of the train engaged in coupling them, in consequence of which the switchman is injured, the engineer's act is misfeasance, not non-feasance.

"3. When the master is made liable for the negligence or wrongful act of his servant solely upon the ground of the relationship between them under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act by his presence or express direction, he is liable severally only and not jointly with the servant."

I go back now for a moment to quote from the opinion by Metcalf, J., in the case of *Parsons v. Winchell, supra*—the reason of the rule that though the parties may both be liable, they may not be sued jointly (page 593).

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect.

In trespass all are principals, and he who commands a trespass to be committed, though absent when it is committed, is regarded as a trespasser and may be sued alone or jointly with him who obeyed his command. And it has been decided that where one of several proprietors of a coach and horses acted as driver in the absence of the others and injured a third party by negligent driving, that he and the other proprietors were jointly liable to such party in an action on the case. *Morton v. Hardern*, 6 Dowl. & Ry., 275; and 4 Barn. & Cres., 223.

“They were all held to be responsible for the conduct of the person whom they suffered to drive, whether he was one of themselves or their servant. But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. ‘He is liable,’ says Lord Kenyon. ‘to make a compensation for the damage consequential from his employing an unskillful or negligent servant.’ 1 East., 108. The servant also is answerable to the party injured by his acts done as servant, and is answerable to the master for any damages which the master is compelled to pay for his wrongful acts, unless those acts were directed by the master. But if a master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly, as joint wrong-doers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement nor even for contribution. *Merryweather v. Miran*, 87 R., 186; *Vose v. Grant*, 15 Mass., 505, 521.”

I repeat, whether that is so now, we are inclined to doubt. If the action should proceed against the master and his servant jointly and a joint judgment be rendered against them, and the master should satisfy it and it should turn out that the fault was that of the servant, that is, as between the master and the servant, the servant should answer to the master and make him whole. We are inclined to think that, under our practice, a joint judgment in a joint action against them would not be a bar to an action by the master against the servant to require him to make the master whole. Because it would have been a bar or would have prevented such action by the master against the servant under the common law methods of procedure is the

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reason, as we understand it, why the action against them jointly was not allowed to go forward.

I speak of a case where the recovery is on account of the wrongful act of the servant and the servant is liable because of his own act, and the master is liable solely because of the servant's act. If, in a case of that kind, judgment should be rendered against both, and the master should satisfy it, the master ought to have an action against the servant to recover the whole amount—not contribution. This would not conflict with the doctrine that contribution between joint tort feors can not be compelled. The servant has violated his duty to the master, whereby the master has been mulcted in damages, and the servant should relieve the master of all burden. But we suggest this simply as a question that has arisen in our minds in the case. We feel bound to adhere to the rule laid down by the Supreme Court in the case of *Clark v. Fry*, *supra*, until that court shall see fit to adopt a different rule.

In the case of *The American Bridge Company v. Hunt*, in 130 Federal Reporter, page 304, Judge Lurton, delivering the opinion of the Circuit Court of Appeals, Sixth Circuit, calls attention to the fact that there is a difference of opinion upon this question among the courts of the country. I quote:

“Whether there is such legal identity of master and servant or concert between them as to justify a joint action when the act or negligence charged is that of the servant alone, and the liability of the master is bottomed not upon any immediate fault of the master, but upon the liability of the latter for the negligent acts of the servant, may admit of much discussion.”

He then proceeds to cite the Warax case found in the 72 Federal Reporter, and a number of other cases in support of the rule that they may not be sued jointly, and then says:

“It must be confessed, however, that the doctrine of the common law with reference to the joinder of master and servant in one suit based alone upon the tort of the servant, as in the Warax case and other cases cited above, is shaken by contrary intimations found in *Powers v. Chesapeake, etc., Ry. Co.*, 169 U. S., 92-97 (18 Sup. Ct., 264; 42 L. Ed., 673); and *Chesapeake & Ohio R. R. Co. v. Dixon*, 179 U. S., 131-137 (21 Sup. Ct., 67; 45 L. Ed., 121). This question, though a nice one, and not

foreclosed by authoritative decision, does not necessarily arise upon this transcript as we construe the averments of plaintiff's petition."

So nothing was decided upon that point in that case. I call attention to it to show that it seems to be regarded in some courts as still an open or debatable question. Counsel cite other authorities indicating the same thing.

The practice pursued in this case in the court of common pleas is not familiar to us, but we can not see why it was not appropriate and right. We suppose that the same results might have been reached in other ways, but that is not important. We can not see why, when this evidence came in, the construction company might not have been dismissed from the case at once upon its own motion. It appearing that it was not jointly liable with Hatch and that it did not have an office or place of business in this county; but it is perhaps immaterial which course was pursued. I think the course pursued was one that was as favorable as possible to the plaintiff in error here. Perhaps the court below might have gone further; certainly it could have done so under the common law practice. It could have at once dismissed the case as to both without saying anything about election, upon the ground that there was a joint cause of action stated and improperly prosecuted, against two defendants, and no attempt to prosecute a several cause of action against either. But the court, as I say, took the course most favorable to plaintiff in error. It gave him an opportunity to amend by dropping one of the parties and proceeding against the other, and gave him his election as to which he would drop out, and which he would proceed against. But the plaintiff did not choose to avail himself of this opportunity. He insisted upon his right to proceed against both as upon a joint cause of action. We think the court was right in requiring him to proceed against one only, and it is conceded by counsel for plaintiff in error that if the court was right in its ruling upon this question, it follows that the court was right in its further action of dismissing the action as to both, because of non-compliance by the plaintiff in error with its order in the premises; and we are of the opinion that there was nothing else left for the court to do.

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Having made that order respecting election, if it was not obeyed, the court could not well do anything else but dismiss the action and refuse to allow the plaintiff to proceed with his action against both; and this order of dismissal, we think, is justified by the fact that the court was correct in its ruling that it was not a joint cause of action—not one against which the defendants could be required to answer jointly. The judgment of the court of common pleas will be affirmed.

C. A. Thatcher, for plaintiff in error.

Smith & Baker and *W. H. McLellan, Jr.*, for defendants in error.

ESTOPPEL AS TO COLLECTION OF STREET ASSESSMENTS.

[Circuit Court of Hamilton County.]

ISABELLA M. BELL V. THE CITY OF NORWOOD ET AL.

Decided, March 10, 1906.

Assessments—For Street Improvement—Bar of the Statute as to Collection of—Reservation in Deed as to Payment of—Estoppel—Burden of Proof.

1. The bar of the statute against a municipality as to the collection of a street assessment, levied prior to the act of April 25, 1904, does not begin to run on the several installments until each of said installments becomes due and payable.
2. The burden of proving an estoppel against a property owner as to a street assessment is upon the treasurer seeking to enforce the collection.
3. The intention of a grantor and grantee as expressed in the recital in the covenant of warranty, "except maturing street assessments on Floral avenue which the grantee assumes and agrees to pay," is construed in this case to be that the grantor was to be relieved from any liability on account of said assessment, and not that the contract should inure to the benefit of the municipality.

JELKE, P. J.; SWING, J., and GIFFEN, J., concur.

Prior to the act of April 25th, 1904 (97th O. L., 403), whatever statute of limitation ran in favor of the property owner and against the municipality did not begin to run until each of the several installments became due. Whatever bar may op-

erate as between the property owner and the municipality, must begin to run from the same date. While the assessment became a lien from the time the ordinance was passed, yet the statute did not begin to run on the several assessments until they became due and payable, like the postponed payments provided for in a mortgage.

We are therefore of the opinion that the plaintiff is barred from maintaining her action as to the first installment of said assessment, but that she may maintain the same as against all subsequent installments.

It is contended by the county treasurer in the interest of and on behalf of the city of Norwood, that the plaintiff herein is estopped from contesting the assessment on Floral avenue because the deed contains in the covenant of warranty, the following sentence: "Except maturing street assessments on Floral avenue which the grantee assumes and agrees to pay." This is all the evidence we have before us. The question arises whether the rule laid down in the case of *Caldwell v. Columbus*, 37th Weekly Law Bulletin, 270, affirmed in the 56th O. S., 759, or the rule laid down in *Walsh et al v. Sims, Treasurer*, 65 O. S., 211, applies. It turns upon the question of fact as to whether or not there was an allowance of a definite sum made to the grantee as part of the consideration. Of course if the grantee has been allowed a sum certain, and has practically been a depository, or trustee, of such sum for the payment of the assessment on Floral avenue, it makes no difference to the grantee whether such assessment is legal or illegal. On the other hand, if there has been no such allowance to the grantee, and this exception of the covenant warranty is to be considered merely as a contract between the grantor and grantee that grantor shall be relieved from any assessment, then grantee is not estopped from setting up and availing himself of the illegality of any assessment.

This court has heretofore held that the Floral avenue assessment is illegal and void, and the Supreme Court has sustained this conclusion. The burden of proving the estoppel against the property owner is upon the treasurer. Looking then to this

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deed, and in the absence of other testimony, we find that the intention of the contracting parties was that the grantor was to be relieved of any liability on the warranty on account of this Floral avenue assessment, but it was not intended to make a contract which should inure to the benefit of the city of Norwood or make the grantee the custodian of a definite sum of money for the payment of this assessment.

We therefore find on the equities for the plaintiff, and a decree may be had accordingly.

W. R. Collins and L. F. Hanger, for plaintiff.

Oliver G. Bailey, contra.

REQUIREMENTS AS TO BUILDING PERMITS.

[Circuit Court of Lucas County.]

THE CITY OF TOLEDO V. GEORGE J. KIEBLER.

Decided, March 4, 1905.

Building Ordinances—Requirements as to Securing Permits—Prosecution of Contractor for Failure so to Do—Defective Affidavit—Validity of Ordinance—Policy of the Courts.

1. It is an established rule of courts that the question of the constitutionality of a statute or the validity of an ordinance will not be determined, unless a case is presented which makes such determination necessary.
2. An affidavit which charges a contractor with proceeding to erect a building without first having obtained the required permit from the building inspector is insufficient upon which to base a conviction, where the requirement of the ordinance is that such a permit shall be taken out by either the owner of the building or the contractor, and the affidavit does not state that the owner had also failed to take out a permit.

HULL, J., HAYNES, J., and PARKER, J., concur.

The defendant in error—who was also defendant below—was prosecuted in the police court of this city for violating a section of the building ordinances of the city of Toledo.

By an ordinance of the council of this city, a building department was established and provisions were made for a building inspector and provisions with regard to the obtaining of permits for the erection of buildings of any kind, and a penalty imposed of fine and imprisonment for violation of this ordinance. The permit requires a fee, from a minimum of two dollars up to one thousand dollars, being at the rate of two dollars a thousand and not to exceed one thousand dollars. It was charged in the affidavit that Kiebler, being the agent and contractor of one Maude Mitchell—who was the owner—erected a building in this city without said Kiebler obtaining a permit therefor, as required by the ordinance. Walter C. Hudson was at the time the inspector and made the affidavit. A demurrer was filed to the affidavit, which was sustained, and defendant was discharged by the police court. The case was taken to the court of common pleas on error and the judgment of the police court was affirmed. Error was then prosecuted to this court.

It is claimed by the defendant in error that, for various reasons, the action of the police court was correct. It is claimed that the legislation on this subject was invalid and unconstitutional. It is claimed further, that Hudson was never properly appointed or selected as building inspector, and this seems to have been the ground on which the police court sustained the demurrer to the affidavit. Other grounds were urged, as I have said, and the court of common pleas found the affidavit invalid, on various grounds. It is claimed that the city has no power, under the statutes of the state, to pass such an ordinance; that while it has the power to regulate the erection of buildings, it has no power to impose a fee, and to require the owners to pay a fee for the securing of a permit to erect buildings upon their own property. And it is claimed further that the provision requiring the payment of a fee for such purpose is unconstitutional and in conflict with the Bill of Rights, as interfering with the right of private property.

The case as argued presents many interesting questions. In the view that we take of it, however, it is not necessary or proper for us to consider these questions as to the validity or consti-

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tutionality of this ordinance relating to buildings. We have reached the conclusion that the affidavit is fatally defective, regardless of the ordinance; although the ordinance may be valid in every respect and the officer properly appointed, in our judgment the affidavit does not charge an offense, and it not being necessary to do so, it would not be proper for us to undertake to determine the validity of the ordinance. It is a well established and universal rule of courts that the constitutionality of a statute or the validity of an ordinance will not be passed upon by the court unless it is necessary—until a case is brought before the court that makes it necessary to pass upon such questions.

The affidavit charges that Maude Mitchell was the owner of this property; that “the defendant being then and there a contractor for and agent of one Maude Mitchell did unlawfully proceed with the erection of a certain building located on Parkwood avenue in the city of Toledo, Lucas county, Ohio, of which building the said Maude Mitchell was then and there the owner, without he, the said George Kiebler, having first obtained from the inspector of buildings of said city of Toledo, Ohio, a permit for such erection,” etc. The affidavit charges that Maude Mitchell was the owner of the building and that Kiebler was the agent and contractor for her; that he proceeded to the erection of said building “without him, the said George Kiebler, having first obtained from the inspector of buildings a permit.”

Section 1 of the ordinance requires either the owner or the agent to procure a permit to erect a building.

“A permit for such erection or alteration or the undermining of any such sidewalk shall be first obtained from the inspector of buildings by the owner or his agent, and it shall be unlawful to proceed with the erection or alteration of any building, or part of any building, or any such platform, staging or flooring, or the undermining of any sidewalk in the city of Toledo, unless such permit shall first have been obtained from the inspector of buildings.”

So as appears from the ordinance the permit may be obtained either by the agent or by the owner. In most cases, it probably would be obtained by the owner, and if the owner has obtained

a permit, of course it is not necessary for the agent or contractor to do so—only one is required, and to charge this offense against Kiebler as agent and contractor, the negative allegation should be made in the affidavit that no permit had been obtained by the owner. For aught that appears in the affidavit here, the owner may have obtained a permit and Kiebler may have had it in his pocket at the time he began the erection of and while erecting this building. It is very clear to us that this affidavit does not charge an offense under this ordinance. It does not charge a violation of the ordinance for the reasons stated, and it would be improper for us to consider these other questions when no offense whatever has been charged under the ordinance as it stands. The only question for us to determine is, whether the action of the police court was correct in discharging Kiebler and whether the judgment of the court of common pleas sustaining the demurrer should be affirmed.

It is clear that the judgments of the lower courts were correct and they should be and are affirmed.

U. G. Denman, Charles K. Friedman and Charles W. Meck,
for plaintiff in error.

Chittenden & Chittenden, for defendant in error.

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SUFFICIENCY OF PLEA IN BAR.

[Circuit Court of Lucas County.]

ED. HORNER v. THE STATE OF OHIO.

Decided, June 16, 1906.

Criminal Law—Plea in Bar—Sufficiency of, a Question of Law—Defective Indictment—Variance—Section 7258.

1. A plea in bar to a criminal charge does not present an issue solely for the jury; such a plea may be examined by the court as to its sufficiency, and if it be found that it is insufficient as a matter of law it may be so adjudged, and the jury discharged without prejudice to a further prosecution for the same offense.
2. A plea in bar which merely sets forth that the defendant has been previously put upon trial on an accusation of the same offense, and does not set forth the indictment on which he was tried, or even allege that it was a valid indictment, is insufficient in law and presents no issue for the jury.
3. Inasmuch as it can not be said that a second indictment charges the same offense as a previous indictment under which the defendant was properly tried before a jury, the court in the second prosecution can not take judicial notice of what took place at the first trial.
4. A substantial variance is presented where an indictment charges the theft of property belonging to John W. E——, and a subsequent indictment charges the theft of property belonging to Joseph W. E——, and a conviction or acquittal under the first indictment is not a bar to prosecution under the second indictment.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

In this case, plaintiff in error was indicted, tried and convicted, upon a charge of stealing money from one Joseph W. Emery. The indictment asserted the sum of money stolen to be \$128 and the jury, by its verdict, found him guilty of stealing the sum of \$100. The only claim of error is involved in the assertion of a former acquittal under a plea in bar by the defendant below and the action of the court thereon. The defendant filed the following plea in bar:

“The said Ed. Horner, in his own proper person, comes into court, and having heard the said indictment read, says that

the said state of Ohio ought not to further prosecute the said indictment against him, the said Ed. Horner, because, he says, that heretofore, to-wit, at a term of the court of common pleas, in and for the county of Lucas, in the state of Ohio, of the January Term of 1906 [which, I should say, was a term prior to the one in which the indictment upon which he was tried and convicted was found], the grand jurors of said county, duly impaneled and sworn, presented their indictment against him for the same offense as is charged in the present indictment: that said defendant was duly arraigned in said court, on said indictment and pleaded not guilty thereto. That in the April, 1906, term of court, said cause was set for trial, and thereupon a jury was duly impaneled and sworn, in said cause, in said court, and the state adduced all its evidence against said defendant and rested its case. And the court, thereupon, of its own motion, and without the consent of the defendant, and without finding a sufficient reason therefor, discharged said jury and remanded said defendant to jail. The larceny set forth in said indictment is the same larceny as that set forth in the present indictment and the offense in the former indictment is the same identical offense as that set forth in the present indictment. Defendant has therefore been acquitted of said charge. The said defendant, therefore, prays that he may be dismissed and discharged from the premises in the present indictment specified."

To this plea the state replied, saying, "there is no record of any acquittal of the said defendant for the offense charged in the indictment herein." There follows a general denial of each and every allegation of the defendant's plea.

In our code of criminal procedure the statute as to pleas in bar is embodied in Section 7258, which reads:

"The accused may then offer a plea in bar to the indictment, that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense; to this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon; the issue thus made shall be tried to a jury, and on such trial the accused must produce the record of such conviction or acquittal, or the pardon, and prove that he is the same person charged in the record or mentioned in the pardon; and he shall be permitted to adduce such other evidence as may be necessary to establish the identity of the offense."

The plea in bar and the replication having been filed, a hearing was had, as stated in the journal of the court:

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“This cause came on for hearing upon the plea in bar of the defendant, Ed. Horner, to the indictment herein and the replication of the prosecuting attorney thereto, and was argued by counsel and submitted to the court. And upon consideration thereof, the court doth find the said plea to be insufficient, and the allegations thereof not shown to be true, and doth overrule the same; to which action of the court the defendant, by his counsel, then and there excepted. And thereupon the said defendant, being present in court with his attorney, waived the reading of the indictment against him and pleaded not guilty to the said indictment. Thereupon a jury was impaneled and sworn, a stenographer was ordered to report the evidence herein, at the request of both sides, and the trial began.”

And the entry further recites the fact of the trial and the rendition of a verdict.

At first blush it might appear that the issue presented by the plea in bar was one solely for the jury, and that no statutory power was given to the court to pass upon the sufficiency of the plea. But while no provision is found in the criminal code for either demurrer to the plea or any other method of obtaining the judgment of the court upon its sufficiency, it is distinctly held, in the case of *Hurley v. State*, 6 Ohio Reports, 399, that a court did not err in sustaining a demurrer to a special plea in bar in a criminal case, where the court deemed the plea insufficient, and where it was in fact so. And in the case of *Gormley v. State*, 37 O. S., 120, it was held:

“A plea of former conviction, which is insufficient in matter of substance, does not raise an issue for a jury, but may be adjudged insufficient on demurrer.”

It is the policy of the law to take cognizance of the defects in an indictment, whether a demurrer is filed thereto or not, if those defects are such as to render the indictment insufficient, as not charging a crime. Of course, as to mere matters of indefiniteness, where the statute provides that to fail to file certain motions, a defendant shall be deemed to have waived his rights, the court could not, on the trial of the case, stop the introduction of evidence, or instruct the jury to find a verdict for the defendant, because of such defective indictment. It is analogous to the conditions that arise under the code of civil procedure.

Questions as to jurisdiction of the subject-matter and the sufficiency of the facts to constitute a cause of action may be raised at any stage of the trial, or even in arrest of judgment; whereas, matters of mere form can not so be presented, but they must be called to the attention of the court in due season. If this plea in bar was insufficient, and if the court could so have adjudged it on demurrer, we have no doubt that the court would be equally justified, if the question were submitted to the court as to the sufficiency of the pleadings, in determining it without a demurrer; that is, in examining it to ascertain whether there was any proper issue to go to the jury.

Examining this plea in bar, we find that it alleges that the defendant had been put upon trial at a former action upon an accusation of the same offense. But it is not alleged that the charge was made in proper terms of law so that a conviction could have been had. The plea says that an indictment was found; it does not say that it was a valid indictment—that it was sufficient in its terms as charging an offense properly, nor does it embody the indictment in the plea so as to apprise the court of its terms. The plea further says that the court discharged the jury without sufficient cause, but what the cause was is not stated. Now, to hold that it was the duty of the court to send such issues as these to a jury, would be to require the court to instruct the jury to pass upon the sufficiency of the court's action and upon the validity of the former indictment. As to the identifying of the offense, a question of fact might be presented; but the sufficiency of the indictment, or its insufficiency, would be a question of law, to be determined by the court, and the sufficiency, or insufficiency, of the court's reason for discharging the jury, after it had been impaneled and sworn would be a question of law, to be addressed to the court, rather than to the jury.

Now, in order that the court might be apprised of the exact condition of the former record, the plea in bar should be so explicit that the court could pass upon the matter. Possibly in this case everything was shown to the court to enable the court to do it when the plea in bar and the reply thereto were submitted to the court for its action; there is no bill of exceptions

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to show what was shown to the court. There is nothing to show of what the court took cognizance in passing upon the sufficiency of the plea. The court either had the former record or the court did not have it at the time when the court adjudged the plea in bar to be insufficient. Assuming, for a moment, that it was not produced—as it does not appear in the plea—we must examine some of the authorities to determine whether it was requisite that it should be shown to the court.

In the case of *Foster v. State*, 39 Alabama, 229, it was held:

“In a plea of former conviction or acquittal, it is necessary to set out the record, or at least the indictment.” * * *

In the case of *Smith v. State*, 52 Alabama, 407, it was held:

“A plea of former acquittal interposed as to one offense, based on an acquittal on a trial for another charge, must set forth among other things, the indictment on which such trial was had.” * * *

In the case of *Evans v. State*, 54 Arkansas, 227 (15 South-western Rep., 360), the court held:

“A plea of former conviction is insufficient which does not verify the alleged conviction by the record, nor allege that it was for the same offense the second prosecution was intended to punish.”

The plea here does allege that it was for the same offense, but it does not verify the statement by any production of the record.

In the case of *Washington v. State*, 35 Tex. Crim. App., 156, (32 S. W. Rep., 694), it appears that:

“Appellant was convicted of assault with intent to murder, and given two years’ confinement in the penitentiary, from which conviction he prosecutes this appeal. It appears from the record that appellant shot at one Edwards, missed him and killed one Black. Appellant was tried and convicted of the murder of Black. He was then placed on trial under this indictment for an assault with intent to kill and murder Edwards. He attempted to plead in bar of this prosecution the judgment of conviction for the murder of Black.

“If the plea had been in proper form, containing what the law requires, it would have been a good plea in bar to the prosecution for this assault to murder, because everything that was done by the defendant, all of the unlawful intents and pur-

poses which went to make up a case of assault to murder, were utilized in the murder case. The state excepted to the sufficiency of the plea, and the court sustained the exception. It is well settled that a plea of former conviction or acquittal must contain the indictment, the verdict of the jury, and the judgment of the court. This record does not contain the indictment, nor the conviction and judgment, and there was no error in sustaining the demurrer to the plea."

And the court add, a little lower:

"This record, as above stated, does not contain in any part thereof the indictment nor the judgment in the murder case, and we can not determine from this record whether the conviction was had upon a valid indictment, or whether judgment was even rendered upon that conviction."

In further support of this position reference should be made to the citation of counsel for the state: 1st Bishop New Criminal Procedure, Sections 809 and 810, Subdivision 2, page 474; and also Bishop's Directions and Forms, Section 1043, page 593. "How is a record fact to be alleged?" Section 93, page 43.

It is said by counsel that Laning's Form Book has a form of plea in bar like the one in the present case. We have not had access to that. It is proper to note that these forms should be taken in both of these works for just what they are worth, as the opinions of compilers or book-makers; but, after all, they must be based upon correct principles and be properly supported by authority, to justify their use as authority to the court.

Our judgment is that this plea in bar should have contained the indictment; but whether it should have contained also a copy of the journal, to show the action of the court on a former trial in discharging the jury from a further consideration of the case; whether that journal would have disclosed a sufficient reason therefor, it is unnecessary for us at present to consider. It is enough to say that the plea in bar should have set forth the indictment upon which the former partial trial was had.

There is a case in Massachusetts (*Commonwealth v. Bosworth*, 113 Mass., 200), which, at first glance, would seem to run counter to the decisions to which I have made reference. The holding, as disclosed by the syllabus, is:

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“When an inferior court has jurisdiction of an offense upon property, if the value of the property does not exceed a specified sum, a plea of a former acquittal of such offense in the inferior court is a good bar to an indictment for it in a superior court, although the value of the property is alleged in the indictment to be a sum exceeding the jurisdiction of the inferior court.”

It seems from an examination of the case that the indictment or the complaint was not embodied in the plea in bar in the second case; but a further examination, and a more critical one, shows also that a plea in bar, in Massachusetts, without containing the indictment, is sufficient by reason of the statutory form of the plea in bar in that state provided. Judge Gray says, page 468:

“The defendant’s plea in bar of a former acquittal before the Municipal Court of Taunton, of the same offense for which he now stands indicted in the superior court, is in the form prescribed by St. 164, c. 250, Section 4, and is therefore sufficient in form, without more fully setting out the record of that acquittal or the facts relied on to prove the identity of the former offense against him.”

It might be urged, with an apparent slight show of authority, that the court should take judicial cognizance upon the latter trial of what previously took place under an accusation of the same character and which the plea in fact has alleged to be for the same offense, although upon an indictment rendered at a former term. There is a case in Texas (*Foster v. State*, 25 Tex. App., 543 [8 S. W. Reports, 664]), in which it was held:

“Although a plea of former jeopardy and former conviction omits to set out the indictment and judgment referred to, and would therefore be fatally defective if both trials had been in different courts, such defect will not bar the defense of jeopardy and former conviction when both trials were in the same court, since the court takes judicial cognizance of previous proceedings in the case.”

An examination, however, of the cases cited shows that the two trials were both upon the same indictment, so that the record of all the legal proceedings with reference to the indictment would apprise the court fully of all that had taken place upon the first trial. I will not stop to read from the case any further than I have done.

We think that where a defendant has been tried before one jury, upon one indictment, is again indicted and is tried upon the second indictment, it can not be said to be the same case; nor can the court in the second prosecution take judicial cognizance of the proceedings in the first.

It is claimed that the statute of Ohio relieves the defendant from inserting in his plea in bar the indictment, or any portion of the record under which the former conviction or acquittal occurred. The statute, Section 7258, says:

“The accused may then offer a plea in bar to the indictment, that he has before had judgment of acquittal, or has been convicted or pardoned, for the same offense.”

But we are not of opinion that in the use of this general phraseology the Legislature contemplated the omission of the ordinary requirements of a plea in bar. It was simply placing in the statute a provision as to a plea already recognized in criminal law, merely providing that one accused may properly set up a former acquittal, or a former conviction, in bar of a prosecution for the same offense. There is no attempt apparent in the section to define what shall be the proper form of such plea. We have found in *Gormley v. State*, 37 O. S., 120, and *Harley v. State*, 6 O., 399, the two cases to which I have made reference, that it was the duty of the court to pass upon the legal sufficiency of the plea in bar. The court in this case did so, and announced its decision, and thereupon, it is said, overruled the plea. The defendant then entered a plea of not guilty, and the jury being impaneled, the case proceeded to trial, and a conviction was had, as heretofore stated.

Now, if counsel are correct in their contention, that this plea in bar, and the reply thereto, presented an issue for a jury, and that it was the duty of the court to send the whole matter to the jury to determine the issues of law as well as the issues of fact, a question might still be urged as to whether some further duty did not devolve upon the defendant in order to preserve his rights under the plea. In Section 7258, to which I have already referred, in the latter part of the section, it is provided:

“The issue thus made shall be tried to a jury, and on such trial the accused must produce the record of such convic-

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tion or acquittal, or the pardon, and prove that he is the same person charged in the record, or mentioned in the pardon; and he shall be permitted to adduce such other evidence as may be necessary to establish the identity of the offense.”

We have here no bill of exceptions showing what evidence was offered to that jury which was impaneled and sworn. There is no statement in the record that the jury was impaneled and sworn simply to try the defendant upon the issue as to whether he was or was not guilty as charged in the indictment, and our judgment is that even if it was the duty of the court—which we do not find—to send any matter concerning the former trial to the jury for its consideration, after the court had considered the plea to be insufficient, under those circumstances we think that in order to further preserve his rights the defendant should have followed the requirements of this section of the statute and produced the record of the former claimed acquittal and should have offered proof that he was the same person charged in the record; and then he might have introduced such other evidence as would have been proper, in order to establish the identity of the offense, all this being denied by the reply.

It is said in the petition in error that “Said court erred in not submitting the issues joined on said plea in bar and replication of defendant in error to a jury.” We find no request that the court should do so, and no exception to the court’s not doing it. Presumably, if it was a proper issue to go to the jury, the court, if the request had been made, would have granted the request and have submitted the issue to a jury. All the presumptions are in favor of the correctness of the rulings of the court below, and in the absence of any showing of what was done by counsel or by the court, further than is disclosed by the journal entry before us, we are unable to say that the court did not have sufficient ground for the action which was taken in holding, in the first place, that the plea was insufficient, and in the second place, in submitting the case generally to a jury for its consideration. No instruction was requested from the court that the jury should find first as to whether or not the claims made in the plea in bar were true. There is nothing expressed in this statute that the same jury may not try both issues—it

may or may not. It is not necessary, in our view of the case, to enter upon an inquiry as to the legal scope of the jury's duty. But, as I have already said, there is nothing in the record or the statute to show that this jury was charged with the sole duty of determining the guilt or innocence of the defendant.

We might go still further and examine the record which has been handed up, and consider the statements of counsel upon both sides as to what took place upon the former trial. We do not think that the record of the former trial has any proper place here, but the plaintiff in error has seen fit to submit it for our consideration, and under those circumstances we have examined it. We have listened to the statements of counsel, that the first indictment charged the stealing of money of one John W. Emery, instead of that of Joseph W. Emery, as in the second indictment. The written record does not fully apprise us as to whether it was a mere mistake as to the name of a person who was really sought to be described as the owner of the money stolen, or whether it was a mistake in charging the wrong person as the owner, but we are informed by counsel that there were, in fact, two men—one named John W., and the other Joseph W., and that in the first indictment the charge was really of stealing the property of John, while in the second indictment it was for the stealing of the property of another man—Joseph. Now, if all that be so, we think that an acquittal or conviction upon the charge for the stealing of the property of one would not be a bar to a subsequent prosecution for the stealing of the property of the other. It would require different proof; it would require different evidence as to ownership; and, having these views, we think the judge upon the first trial was justified in taking the action which he did when it was discovered that the ownership was not in the person who had been named in the indictment as the owner. We think that a proper case arose for the application of Section 7303 of the Revised Statutes:

“If it would appear at any time before verdict that a mistake has been made in charging the proper offense in the indictment, the jury may be discharged without prejudice to the prosecution, and the accused, if there is good cause to detain him, may be recognized to appear at the next term of the court, or, in default

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thereof, committed to jail; and in such case the court may recognize the witnesses for the state to appear at the same time and testify.”

The case in 42 O. S., 383 (*Mitchell v. State*), we think, does not apply to this case, because there a conviction of the offense of an assault could have been shown by evidence adduced on either trial, or under either indictment. It was not so here. The finding of a person guilty under one indictment would not be equivalent to finding him guilty under the other, unless the variance was a more immaterial one—one not tending to the prejudice of the defendant—a variance as to names but not as to persons. The court, on the former trial, found that it did tend to prejudice the defendant. The defendant was urging the mistake in the indictment as a ground for his discharge, and the court would not have been justified in discharging the jury on the former trial if it were an immaterial variance and one that did not tend to his prejudice. The court must have found that it was a material variance, and, so finding, deemed it a case for the application of this statute. There was an attempt to charge a proper offense but there was a mistake in charging it, because it was charged to be committed against another person than the real owner of the money. Ownership was a material fact in the indictment. Under such circumstances the statute should be applied in order to prevent a failure of justice. If the contention of counsel is correct, that the jury, instead of being discharged, should have been instructed to acquit, then on the assertion of such a mistake as this, there would be no possibility of convicting a man for a proper offense.

We think, in view of all the circumstances of the case, and all the considerations urged by counsel, in argument, that it can not justly be said that this defendant has been twice placed in jeopardy for the same offense.

Having fully considered the questions presented and naturally arising in the case, our conclusion is that the judgment of the court below should be, and it therefore is, affirmed.

J. P. Crawford, for plaintiff in error.

L. W. Wachenheimer, Prosecuting Attorney, for defendant in error.

**RIGHTS OF LESSOR AND LESSEE IN FUND DERIVED FROM LAND
WHICH HAS BEEN APPROPRIATED.**

[Circuit Court of Hamilton County.]

HENRY J. GOOD V. CHARLES F. DROSTE.

Decided, July, 1906.

Appropriation—Property under Lease—Subsisting Liability of Lessee for Rent—Interest of Lessee and Lessor in the Award.

Land under lease with privilege of renewal was condemned for railway purposes, and a jury fixed the value of the part taken with damages to the residue, and in answer to a special interrogatory found that \$15 of the monthly rental of \$115 was taken by reason of the appropriation. Thereupon the court, in the order of distribution, impounded \$1,200 of the share of the verdict awarded by the jury to the lessee for payment of rent during the additional term in the event the lease was renewed, or to be paid in full to the lessor in the event the lease was not renewed. *Held*: That this was error, and that the court should have determined the conflicting claims of the lessor and the lessee in the award.

GIFFEN, J.; JELKE, P. J., and SWING, J. concur.

This controversy arises upon the distribution of a fund awarded by the jury in proceedings to appropriate property commenced by the Trustees of the Cincinnati Southern Railroad.

The defendant in error Droste, leased to the plaintiff in error, Good, two lots, one on the west side and the other on the east side of Carr street in the City of Cincinnati, for a term of ten years from August 1, 1903, with the privilege of renewal for an additional term of ten years, at a yearly rental of \$1,380, payable in monthly installments of \$115.

The trustees appropriated a strip of ground forty feet in width across the middle of the lot on the east side of Carr street. The jury awarded damages as follows:

First.	For the strip of land taken	\$1,693.71
Second.	Value of the building	1,800.00
Third.	Damages to the residue of the property....	1,143.79

Total..... \$4,637.50

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and apportioned the same as follows: To Henry J. Good, \$2,864.50; to C. F. Droste, the owner, \$1,773.

In answer to a special interrogatory, the jury found that fifteen dollars of the monthly rental of one hundred and fifteen dollars was taken by reason of the appropriation.

The court on motion of Droste impounded twelve hundred dollars of the sum awarded to Good to provide for the payment of rent during the additional term of ten years in the event the lease was renewed or to be paid in full to Droste in the event the lease was not renewed.

It is held in the case of *Foot v. The City of Cincinnati*, 11 Ohio, 408, that the liability of a lessee to pay rent subsists, notwithstanding the leasehold has been appropriated for a street; but we see no good reason why the lessee should be held for rent during the renewal period before his election to renew. While the jury apparently allowed Good the full amount of the rent at \$15 per month for the additional term of ten years, yet an analysis of the apportionment made by the jury will show this not to be the fact. The present value of the annual rental of \$180 for the balance of the original term, to-wit, eight years, upon a basis of five per cent. is according to the annuity tables, \$1,156.17, which sum or its equivalent in monthly installments must be paid by the lessee to the lessor, and adding this sum to the amount awarded to the lessor, it amounts to \$2,929.17, being \$91.67 more than the jury awarded for the entire premises exclusive of the value of the building. Deduct the sum of \$1,156.17 from the amount awarded to Good, and it leaves \$1,708.33, which represents the sum awarded to Good, as the value of his interest in the building; while the \$91.67 represents the sum awarded to Droste for his interest in the building.

Neither the jury nor the court found in terms the respective interests of the lessor and lessee in the building. It is contended by counsel for Good that he furnished substantially the entire sum. If this be true, then the apportionment made by the jury should be confirmed by the court; otherwise it should ascertain from the evidence the interest of each in the building for which the jury awarded the sum of \$1,800, and render judgment accordingly. We think the court is authorized under the statute

to determine the conflicting claims of the lessor and lessee. *Skerret v. Presbyterian Society*, 41 O. S., 606.

The judgment will be reversed and cause remanded for further proceedings.

John C. Healy and Kelley & Hauck, for Good, plaintiff in error.

Charles F. Droste, for defendant in error.

DISCHARGE OF PRISONER FROM PENITENTIARY.

[Circuit Court of Franklin County.]

IN THE MATTER OF APPLICATION OF IRA BAILUS.*

Decided, June, 1906.

Meaning of the Words "Period of Imprisonment"—Discharge of Prisoner—Restoration to Citizenship—Ministerial Acts—Section 7388-8.

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

The term "period of imprisonment" as used in Section 7388-8, of the Revised Statutes, means the term of sentence, less the time which, under the rules of the penitentiary, may be deducted for good conduct.

The discharge of a prisoner by the warden of the penitentiary, and the restoration to citizenship by the certificate of the governor, under the provisions of said section, are ministerial acts and, to be effective, must be in compliance with law.

The acts in this case were not in compliance of law and were a nullity. Otherwise these officers could discharge a prisoner at will.

The original commitment was authority for the retaking of the prisoner.

Judgment affirmed.

*Affirmed by the Supreme Court without report, 74 O. S., —

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Hamilton County.

LOCATION OF DIVIDING LINE.

[Circuit Court of Hamilton County.]

AUGUST PUNTT V. JOHN ZIMMER.

Decided, June 9, 1906.

*Adverse Possession—Mistake in Description—Title—Meaning of Phrase
“With Half Section Line”—Injunction.*

1. Where the description contained in a deed reads “north with the half section line,” the phrase denotes direction and not necessarily that the line intended is identical with the half section line, and the line connecting the corners and not the half section line must be taken as the dividing line.
2. But where it was believed by the grantor and the grantee that the corners were located in the half section line, and both have acted on that belief, the grantee acquires title by adverse possession to the strip lying between the half section line and the true line.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The plaintiff commenced this action to enjoin the defendant from trespassing upon or using his land as a driveway, and from erecting and maintaining a fence on or across his property.

The road in controversy is located in the southwest quarter of Section 22, Town. 4, Range 1, in the Miami Purchase. The land described in the petition and also in the deed offered in support of the plaintiff's ownership, is east of and adjoining Section 22, no part of the same being within the boundaries of such section. The description of the plaintiff's land begins evidently by mistake at the southeast corner of the section instead of the southwest corner. It is manifest, therefore, that the plaintiff has failed to make out a case and his petition must be dismissed.

The defendant by answer, asks affirmative relief and prays that his title to said roadway, which was defined by occupancy and user, and by the deeds conveying the same, be quieted against any and all claims of the plaintiff. The deed under which he claims title to the premises in controversy, contains the following description:

“Lying and being in County of Hamilton, State of Ohio, Township 4, Range 1, Section 22 in the Miami Purchase, be-

ginning at the northwest corner of Joseph Nicholas land; thence north with the half section line 264 feet to common corner of Dorkholtz and Denmons; thence west 20 feet on the line between Dorkholtz and Denmons; thence south parallel with the former line 264 feet or to the center of the County Road; thence east 20 feet to the place of beginning.”

When the two corners called for in the deed are ascertained the line joining them will be the east line of the tract conveyed independent of the half section line, the words “with the half section line” denoting nearness or in the same direction as the half section line and not necessarily upon or along such line.

The testimony, however, tends to show that these corners were intended and understood to be upon the half section line, and the difficulty arises in the fact that at the time the deed for the strip of ground twenty feet in width was made, the commonly accepted half section line was about twenty feet west of the true half section line, and was so understood and recognized by all the adjacent land owners from 1874, the date of the deed, until 1902, when the plaintiff acquired title to his land. The defendant and his predecessors in title have been in adverse possession during all this time, believing that the accepted half section line was the true line, and have therefore acquired title by adverse possession. *Yetzer v. Thoman*, 17 O. S., 130.

A decree may be entered quieting the title of the defendant against all claims of the plaintiff for the strip of ground twenty feet in width so used and accepted by the defendant, each party to pay one-half of costs.

Reemelin & Hosbrook, for plaintiff.

Schorr & Wesselman, for defendant.

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Lucas County.

**PROXIMATE CAUSE OF INJURY FROM FALLING INTO
EXPOSED MACHINERY.**

[Circuit Court of Lucas County.]

**HERMAN BRESEWSKI, AN INFANT, ETC., v. THE ROYAL BRUSH &
BROOM COMPANY.**

Decided, November 6, 1905.

*Negligence—Master and Servant—Proximate Cause—Where One Fell
into an Unguarded Machine—Section 4364-89c.*

Where an employe in stumbling over a block of wood falls into an unguarded machine, and is injured by having his arm drawn into the machine, it is not competent to separate the occurrence into two parts, and say that the block of wood was the proximate cause and the machine merely the physical agency which caused the accident but the case should be submitted to the jury as a whole to determine whether or not under all the circumstances the defendant might have anticipated an accident of that character resulting from leaving the machine exposed.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

This is an action to recover damages on account of personal injury to this infant. He was a boy fourteen years of age; he was employed by the Royal Brush & Broom Company, and while in their employ working in their factory in this city he fell, and, as he fell, his hand and arm went into part of the machinery and was caught by an unguarded belt and pulley or wheel, and was drawn into it and injured. It is averred in the petition that the company was negligent in that it allowed a certain block or piece of wood to remain upon the floor where he was at work, and that he stumbled over this and fell; and, further, that the company was negligent in that it did not keep the machinery guarded as required by the statute, and that this unguarded machinery was one of the causes of the physical injury he sustained.

At the close of the plaintiff's evidence, on motion of the defendant, the jury was directed to return a verdict for the defendant, which was done, and judgment was entered upon it;

and it is on account of this action that the plaintiff in error prosecutes error here. It was said by the judge of the court below, in passing upon this motion, that there was no evidence tending to show that the defendant was in fault in the matter of allowing the block of wood to remain upon the floor, and it fairly appears from the evidence that the floor was kept clean and in good condition, and that if this block of wood was on the floor, as charged by the plaintiff, that it had been there but a few moments, not more than five minutes, and it did not appear that the attention of the defendant had been called to it, or that by the exercise of ordinary care it would have been drawn to it within that time.

It did appear, however, that this machinery was unguarded, that is to say, this belt and the wheel or pulley around which it revolved. The plaintiff below attempted to prove that it would have been practicable to guard it as provided by statute, but he was not permitted to do this, and no weight or consideration was given to the fact of the machinery being unguarded, because of the view this court entertained, that the fact that the machinery was unguarded was not a proximate cause of the injury.

We are favored with the opinion of the judge of the court below and we observe that when he comes to discuss this matter fully and carefully upon the motion for a new trial, he states that the questions are two: First, was the defendant negligent in not enclosing the belt and pulley? and, second, if so, was that negligence the proximate cause of the accident? And, he continues:

“As to the first question, Section 4364-89c, of the Revised Statutes, among other things, provides that the owners and operators of factories shall enclose all exposed cog wheels, fly wheels, band wheels, all main belts transmitting power from engine and dynamo, or other kind of machinery”—and then a hiatus on account of part of the statute not applicable—“with substantial railing.”

Section 4 of the act 4364-89c of the statutes makes a violation thereof a misdemeanor; therefore the act is penal in its nature. But whether it should be strictly or liberally construed

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is, in my opinion, of no importance, for the reason that the provision above quoted states a rule of evidence, and nothing more can be claimed for it. There is no evidence that the belt with which the plaintiff came in contact was a main belt, and the word pulley is not to be found in that portion of the statute, to which I have referred. That the omission of the word pulley was intentional and its apparent distinction between a pulley and a band wheel or fly wheel is evidenced by the fact that provision is made therefor by the subsequent portion of the section.

Now, it seems to us, upon looking at this record, that the learned judge must have been under some misapprehension as to the evidence that had been adduced. He says, "It will be observed that there was no evidence that the belt with which the plaintiff came in contact was a main belt." But one Charles A. Bassett was a witness for the plaintiff. According to his testimony, he was a man of experience in machinery and with machinery of this character, and in the course of his examination he is asked this question:

"I will ask you how that machine was operated?" (I may say here that the machine in question on which the boy was hurt is technically called a sticker, it is a wood working machine).

"Q. I will ask you how that machine is operated?"

"A. It is operated—do you mean driven?"

"Q. Yes, driven: how does it get its power?"

"A. It is driven by means of a belt over a line shaft very near over the machine, going to a countershaft to the machine." (I understand that to mean a counter-shaft which was part of the machine, a countershaft of the machine).

"Q. Around what did the belt pass?"

"A. Around the pulleys, a large pulley on the main shaft and tight and loose pulley with the drive pulley of the machine.

"Q. Those pulleys, what other terms or names is there for them—wheels?"

"A. Yes, sir; they are sometimes called wheels."

Then the court inquires:

"Q. Do you mean a band wheel?"

"A. Not in this case.

"Q. The belt you have before you, is that a main belt?"

"A. Yes, sir.

“Q. These wheels, are they wheels pertaining to the machinery?”

“A. Yes, sir.”

So it will be observed that the witness testifies distinctly that the belt in question was a main belt; he also says that this was not a band wheel, or at all events, he answers, when asked if he means a band wheel, “No, sir; not in this case.” I am bound to say that we do not understand this answer of the witness. It seems to us from an examination of the photographs, and from the little knowledge we have of machinery and from the description of the witness as already given of this machine, that the wheel in question was in fact a band wheel. There must have been, we think, some misapprehension upon the part of the witness when he gave this answer, or he did not mean what the answer would seem upon its face to import. The wheel in question on the machine was what is called a tight and loose pulley, part of the wheel being tight to the shaft rim or face, the other part, perhaps half of the wheel being loose, so that when the belt connected with the main shaft is put over upon the part that is tight, it causes the machine to operate, but when it is moved over into the part of the wheel which is loose, of course the wheel simply goes round and round on the shaft and the machine does not operate.

Now, the statute on this subject is Section 4364-89c, and it provides in part as I have read from the opinion of the judge of the court below. It will be noticed that it mentions among other things to be protected, “exposed cog wheels, fly wheels, band wheels, all main belts transmitting power from engine to dynamo, or other kinds of machinery,” etc. And we understand that a band wheel mentioned in this connection is such a wheel as is under consideration here, a wheel that is otherwise described as a pulley. The judge below thought not, because he says that. in another part of the section, pulleys are specifically mentioned and provision is made therefore. But the only other provision in the section where pulleys are mentioned is this, “the guarding of all saws and other wood cutting and wood shaping machinery, providing shifters for shifting belts, and poles and other appliances for removing and replacing belts on single pulleys, and ad-

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justing runways and staging used for oiling and other purposes, more than five feet from floors with hand railing and providing countershafting with tight and loose pulleys, or such other suitable appliances, in each room separate from the engine room," etc. There is no other provision for the guarding of pulleys unless it is to be found in this provision, and we think it is. The judge speaks of fly wheels and band wheels as if they were similar parts of the machine; but we understand that they are quite different, that a fly wheel is not a band wheel and a band wheel is not a fly wheel; that a pulley upon a machine over which a belt or band passes, by which the machine is operated, is a band wheel; that it can not well be anything else—the very name of the wheel implies that. I read from the Standard dictionary the definition of pulley—one of the definitions, "pulley, a wheel usually flat faced, or nearly so, driving, carrying or being driven by a leather belt or the like; sometimes called a belt pulley." And from Webster's Dictionary, under the head of pulley, "A wheel with a broad rim or grooved rim for transmitting power or imparting power to the different parts of machinery or for changing the direction of machinery by means of a flat belt or round cord or loop." And we all know that the danger in and about a belt and pulley is the fact that the belt may draw one into the pulley, and that it is by reason of being drawn between the belt and pulley that injuries frequently occur; and we have no doubt but what it was the purpose of the Legislature to guard against accidents of this character. And they could not enclose this kind of a wheel or guard the belt without at the same time guarding the pulley. It is sufficient, however, for the purposes of this case upon this point to say that there is evidence in the record tending to show that this is a main belt, and that a main belt must be guarded is clear from the statute.

The fact that this main belt was not guarded clearly appears; there is no dispute about it. If an injury resulted to this boy in consequence of the belt not being guarded, or the pulley and belt, the condition of it affords some evidence of actionable negligence. What degree of evidence under the decisions of this state, we are not prepared to say; we do not feel called upon

to say. It is sufficient for the purposes of this case to furnish some evidence. In some jurisdictions it is evidence of itself *per se* negligence; in some jurisdictions it raises a presumption of negligence; in others the term *prima facie* case of negligence is used. But certainly it furnishes a scintilla of evidence upon which a case, so far as that feature is concerned, should go to the jury. For rules on the subject and citations and decisions of different states, I cite Section 13, Shearman & Redfield on the Law of Negligence. There have been some holdings along this line by the circuit courts and other courts inferior to the Supreme Court of the state; but our attention has not been drawn to any declaration by the the Supreme Court.

That leaves, then, for consideration, we think, only the question which the learned judge has mentioned as the second question in the case. We think in deciding what he called the first question, that he must have overlooked the statement of the witness that this belt was a main belt.

Now, this young man was working at this machinery; there were many machines on the floor; it was a large factory, a large floor. He was engaged in carrying blocks of wood from one side of the building part way across the building, down a broad aisle to another machine called a shaper. He had been carrying during the forenoon of the day from a certain corner of the room, which did not require him to go very near to this machine, called the sticker, where he was afterward injured. The blocks had all been carried from that part; he was required to go to a place near the wall immediately in the rear of this machine; and his direct way to carry these blocks over to the shaper where he was required to carry them was to use the alley way between this sticker and another machine, a broad, comfortable, safe place, apparently, something like five feet six inches in the clear; but as he was passing through there with his first load of blocks, which appears to have interfered somewhat with his seeing—for the blocks were piled up as high as his nose, as he testifies—he came to the vicinity of this machine and fell; he either stumbled or slipped or his ankle turned or something happened that he fell, and as he fell, this machine being to the right of him, he threw out his arm in some way; the machine was in

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operation and his arm was caught between the belt and the pulley and wrenched and injured.

The court below was of the opinion that the fact that the pulley was not guarded was not a proximate cause of the injury, and the same line of argument is pursued by counsel for the defendant in error, that the proximate cause of the accident was this block of wood which caused the boy to fall, that the proximate cause of the injury, the physical injury to the boy may have been the failure to guard the machine; but that the failure to guard the machine was not the proximate cause of the accident. By this course of reasoning the so-called accident is divided for purposes of analysis into the accident of falling and the result of the accident, to-wit, the getting of his hand and arm into the machine and thereby injuring it. It seems to us that this division is not allowable, and is not warranted; that the whole occurrence comes within the description of the accident; that it was a continuous series of events, following one upon the other, the natural sequence of each succeeding event being dependent upon that which preceded it; and that the accident consisted not only in slipping and falling towards the machine, but in falling into the machine and in having the arm drawn into the machine and injured; and that while the falling or stumbling over the blocks may have been a sufficient and effective cause of the first part of the accident or falling toward the machine, the fact that the machine was not guarded and that the boy's hand and arm were thrown into it, whereby it was injured, was a proximate cause of that part of the accident.

The purpose of this statute, as we understand it, was and is to prevent just such occurrences and guard against them; that was the purpose of a great many of the provisions that we find in the statute relating to the guarding of machinery and the management of factories, and we suppose that there may be many cases where the primary movement, which results in an injury from such a machine, may be a pure accident or an inadvertence, and that the companies not observing this statute, the employer not observing this statute may be liable for the consequences of such accidents. It is intended to guard against

accidents and injuries resulting from one making a misstep, making a false move as he is at work about these dangerous machines, and if the employer can in all cases escape liability by showing that there was some other cause of the first primary movement, the initial movement, leading up to the ultimate accident and injury, then it is quite evident that the statute has served its purpose. By way of illustration, the statute on the subject of building may be mentioned, the statute that certain counter-floors shall be placed in buildings as they are in process of construction, Section 4238-20, which requires that:

“Whoever being the owner, lessee, agent, factor, architect, or contractor being engaged in and having supervision and charge of the building, erection or construction of any block, building or structure of more than two stories in height, who shall neglect or refuse to place or have placed upon the joists of each and every story of such block, building or structure above the second, as soon as the joists are in position, counter-floors of such quality and strength to render them perfectly safe the going to and fro thereon of all mechanics, laborers and other persons engaged upon the work of construction or the supervising the same, or in the building or placing of materials therefor, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be fined,” etc.

Now, it can be imagined in a case of that kind, where one is working upon part of the building that is not floored as the statute requires, he may fall, and by reason of the floor not being below where he falls, he goes on down through. He is not injured by the fall, for the floor is not there. He is not injured, it may be said, by the absence of the floor, that is to say, not precisely that—he is injured by coming to a sudden stop upon something beneath. It would be like the story we have heard of a workman upon a building falling down some thirty or forty feet. He said he was not injured by the fall, but he was jarred considerably by the sudden stop he made when he reached the ground. Now, we suppose that in a case of that kind, although one may inadvertently fall through the space where the floor should be, although he may step upon something whereby his ankle turns, he suddenly falls, that liability can not be escaped from on the ground or theory that the primary cause of the

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accident was some inadvertent or accidental movement that he made, which caused him to fall.

In a case like this one at bar, to be sure if one keeps away from the machine at a safe distance, he will be safe, he will not be hurt, the machine will not travel to him, it will keep its place; but it is to be anticipated that a man will go near these machines and a sudden gust of wind will draw his clothes into the machine. Of course, if a person gets into a machine by a movement that is negligent on his part, that would be a defense; but if he is not negligent, if by mere inadvertence, when he is going about his work, by pure accident he falls into the machine, we are of the opinion that liability can not be escaped upon the theory that there was something lying back of the fall that brought him in contact with the machine; that that thing lying back, that primary cause is not only the proximate cause, but the only proximate cause of the injury.

We had occasion to consider this subject with some care in the case of *Ziehr v. The Maumee Paper Company*, 7 C. C.—N. S., 144. That was an accident in many respects like this. In that case there were unguarded cogs. Ziehr was working in the vicinity of them. The floor was slippery. There appeared to be no negligence upon the part of the defendant in having the floor slippery; that seemed to be unavoidable in the kind of work they were doing. But Ziehr slipped and threw out his hand for protection, and he came in contact with these cogs and was injured. We held in that case that the fact that the cogs were unguarded was a proximate cause of the injury, although the primary cause, and one of the proximate causes, was the slipping upon the floor, on account of which there would be no liability. And in the course of the opinion, by Judge Hull, in that case, a number of decisions are cited and some of them are commented upon, and in the course of that opinion reference was made to the case of *Blickley v. The Milner Company*, a case in which Mr. Blickley, while passing along the sidewalk in Jefferson street, fell into the area way by the side of the Milner building and was injured. It was unguarded; the area way was in the sidewalk, the place where an elevator was constructed to take goods into the cellar and out of the cellar; and although

the primary cause of that accident was the slipping upon the icy sidewalk, yet we held that one of the proximate causes of the injury was the failure of the Milner Company to guard this area way. Our decision in that case was reversed by the Supreme Court; there were two grounds urged for a reversal, one that we were in the wrong upon the doctrine of proximate cause, the other that the record disclosed that Blickley was guilty of contributory negligence. The decision of the Supreme Court was not reported, and we are, therefore, in ignorance of the real grounds upon which the Supreme Court decided the case. But until we are better informed, we feel like adhering to that doctrine. We feel that we were right in that case, and that we were right in the case of *Ziehr v. The Maumee Paper Company*, which is now pending in the Supreme Court; and upon the authority of these cases we feel that this case, so much like them, especially so much like the case of *Ziehr v. The Maumee Paper Company*, must be decided in the same way, at least until we are better informed. Therefore, the judgment of this court will be that the judgment of the court below be reversed and the case remanded.

We do not mean to hold that the failure to guard the machine was, under the circumstances, as a matter of law, a proximate cause; but simply that it was a question to be submitted to the jury to say whether or not, under all the circumstances, the company might have reasonably anticipated an accident of this character resulting from this exposed machinery.

Ashton Coldham, for plaintiff in error.

King & Tracy and *H. W. Lloyd*, for defendant in error.

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Hamilton County.

DOMINION OVER CHATTELS CONSTITUTING CONVERSION.

[Circuit Court of Hamilton County.]

H. L. MACKEY, DOING BUSINESS AS THE CINCINNATI MORTGAGE
LOAN COMPANY, v. THE GEORGE W. McALPIN COMPANY.

Decided, March 17, 1906.

Conversion—Facts Constituting—Where Chattels are Seized by Mortgagee—Holding Prior Lien.

The taking possession by a mortgagee of chattel property upon which another holds a prior lien affords ground for an action for conversion.

SWING, J.; JELKE, P. J., and SWING, J., concur.

This action comes into this court on error to the judgment of the court of common pleas. In that court, the George W. McAlpin Company brought suit against the plaintiff in error for the sum of \$272, being the alleged value of a certain piano, which the said George W. McAlpin Company claim was their property, and which was wrongfully converted by the said plaintiff in error. In that court the case was tried to the court without the intervention of a jury, and the court rendered judgment in favor of the plaintiff in error for the full amount claimed.

The principal error relied upon by plaintiff in error in this court is that the judgment of the court was not sustained by sufficient evidence. In the case of *Railroad Company v. O'Donnel*, 49th O. S., page 489, the following statement is made in the second proposition of the syllabus:

“Any wrongful exercise of dominion over chattels in exclusion of the rights of the owner or withholding of them from his possession under a claim inconsistent with his rights, constitutes a conversion.”

The evidence in this case shows that the McAlpin Company had a mortgage on the property for the amount claimed. It also shows that the plaintiff in error had a mortgage on the property in the sum of \$34.50; that the mortgage of the McAlpin Company was prior in date to the mortgage of the plaintiff

in error. One Mr. Berry was a general owner of the piano, having purchased the same from the George W. McAlpin Company, and said Berry had possession of the property. He moved out of the building in which he resided and in which he had the piano, leaving the piano, without notifying either the McAlpin Company or the plaintiff in error. Thereupon plaintiff in error took possession of the piano and removed the same from the building, and stored the same with one Pagels. It fairly appears from the evidence that at the time plaintiff in error took possession of the property, he had no personal knowledge of the prior lien of the McAlpin Company, but shortly after he took possession of the piano, he was informed by the attorney of the McAlpin Company that the McAlpin Company had a prior lien; that the mortgage was on record.

Some time after this, the McAlpin Company made demands on plaintiff in error for the property, with which demand plaintiff in error refused to comply. He not only refused to comply with the demand for the return of the property but also refused to inform the McAlpin Company where the piano was. More than a month after the piano was taken possession of, the McAlpin Company brought this suit as for a conversion.

It seems to us that these facts clearly bring the case within the rule of law as announced in the case above referred to. While the evidence does not disclose that at the time the plaintiff in error took possession of the property, there was any intention to assert any dominion over the property to the exclusion of the McAlpin Company, yet such really was the fact, because the McAlpin Company had the prior claim to the property, and it seems to us that if plaintiff in error intended to disavow its taking upon the discovery of the fact, even if he was not chargeable by the facts as disclosed in the record, it was incumbent upon the plaintiff in error to have disavowed the claim and to have tendered to the McAlpin Company the piano. But instead of doing this, he still persisted in exercising dominion over the property in defiance of the claim of the McAlpin Company, and thereafter the McAlpin Company were justified in treating the act as one of conversion as far as they were concerned.

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Judgment will therefore be affirmed.

Phares, Gusweiler & Rosenberg, for plaintiff in error.

D. D. Woodmansee, for defendant in error.

INJURIES UPON A PASSENGER INFLICTED BY A CONDUCTOR.

[Circuit Court of Fairfield County.]

THE SCIOTO VALLEY TRACTION COMPANY V. JACOB GRAYBILL.

Decided, September 21, 1906.

Tort—Master and Servant—Electric Railways—Liability of Company for Injuries to a Passenger—Ejected from Car Maliciously and Without Justification—Scope of Conductor's Employment—Punitive Damages.

1. It is within the scope of employment of the conductor of a trolley car to control and manage the car and to eject a passenger when necessary to preserve peace and order in the car, and where in so doing a malicious assault is committed the company is liable therefor.
2. Where one who became intoxicated before entering a car, but conducted himself with moderation after the relation of passenger was established, was subjected to an unjustifiable and unprovoked assault and ejectment, a verdict in his favor will not be set aside because for a substantial sum and out of proportion to the physical injuries which he sustained.

TAGGART, J.; DONAHUE, J., concurs; MCCARTY, J., not sitting.

In this case the defendant in error filed his petition in the common pleas court of this county, alleging that he had been wrongfully ejected from one of the cars of the plaintiff in error by the conductor then being in the employ of said traction company, and that said conductor threw him on the floor of the car, dragged him off the car, wounding and cutting his face, bruising his person and otherwise injuring him. There are other averments in this petition which tend to set forth the complaint of the defendant in error, the plaintiff below.

The traction company files its answer and admits that at the time alleged the plaintiff boarded the car and delivered to the conductor a ticket which had theretofore been purchased from

the company's agent as a token of his right to a passage on said car. The answer further admits the averment that the plaintiff was ejected from the car by the conductor, and claims that it was necessary to eject him by reason of the fact that he was intoxicated and using profane and indecent language, and that no more force was used than was reasonably necessary to accomplish that purpose. The case proceeded to trial and judgment, and a motion for a new trial was filed on behalf of the company. But two questions are presented for our consideration:

1. That the verdict is excessive.
2. That the court was in error in its charge to the jury on the trial of said case.

The complaint as to the charge of the court and the right of the plaintiff to recover in this case, rests upon the contention that the conductor was not engaged in the scope of his employment when he committed the assault upon the plaintiff, and that consequently the company is not liable for the unprovoked and unjustifiable assault of the conductor. The second question is a sequence to this—in that the company claims that it could not be held for punitive damages in case the testimony shows that the assault was malicious, willful and unprovoked.

We think it clear from the record in this case that it was the duty of the conductor to control and manage said car, and if necessary to eject a passenger from said car for the purpose of preserving peace and order, and that if the conductor in the line of his duty and while engaged in this employment maliciously and willfully committed the acts complained of the company is liable.

The case of *The Nelson Business College Company v. Lloyd*, 60 O. S., 448, distinctly holds that: "an employer is liable for the willful and malicious acts of his servant done in the course of the servant's employment."

2. "When the act complained of may or may not be from its nature, in the course of the servant's employment, and this depends upon the real motive or purpose of the servant in doing the act, it is a question for the jury to determine upon a consideration of all the circumstances adduced in evidence."

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We think it is clear in this case that the conductor was simply obeying the orders of the master when he undertook to eject an intoxicated man from the car, and that if he added thereto any willful wrong, the company became liable.

But it is contended that the company can not be held for punitive damages in this class of cases. We think this question is answered by the Supreme Court in the case of *The Western Union Telegraph Company v. Smith*, 64 O. S., at page 117, wherein the court quotes with approval the following:

“That a corporation may be subjected to exemplary or punitive damages for tortious acts of its agents or servants done within the scope of their employment, in all cases where natural persons acting for themselves, if guilty of like tortious acts, would be liable for such tortious damages.”

As to the question that this verdict is excessive, it is urged upon our attention that not much injury was done to the person of the plaintiff, that if the elements which constitute compensatory damages were alone regarded, the sum given by the jury in its verdict is outrageously excessive; and that the element of punitive damages must necessarily have entered into this verdict. This contention does not appeal strongly to this court. While this plaintiff may have been guilty of moral deliction before he entered the car of the company, yet the record does disclose that he conducted himself with moderation after the relation of passenger and carrier had obtained. The jury was not called on to weigh with golden scales and adjust with great exactness the injuries resulting from an unjustifiable and unprovoked assault and ejection from the car in the manner in which this plaintiff was ejected by the servant of the company, the jury in their sound discretion were entitled to return such an amount as in their judgment seemed proper. And it does not seem to us that the verdict was rendered under the influence of passion and prejudice. The case was very ably tried and the trial judge was exceedingly careful in giving proper cautions and instructions to the jury, and his instructions to the jury were as favorable to the defendant company as it could claim it was entitled to have.

Judgment affirmed.

Daugherty & Todd, for plaintiff in error.

O. W. McNeely and M. A. Daugherty, for defendant in error.

BENEFITS FROM STREET IMPROVEMENT.

[Circuit Court of Hamilton County.]

GEORGE W. LANFERSIEK v. CITY OF CINCINNATI ET AL.

Decided, June 20, 1904.

Street—Improvement of, Which Benefits the Public Rather Than the Abutting Owner—Building not Erected for Corner Lot Purposes—Increased Light and Air.

Increased light and air resulting from a street improvement can not be considered as a "benefit" arising from the improvement.

GIFFEN, P. J.; JELKE, J., and SWING, J., concur.

The plaintiff is the owner of a lot fronting on Jefferson avenue and abutting 150 feet on Nixon street, which was assessed for the improvement of the street by grading, setting curbs and crossings, flagging and paving gutters, macadamizing the roadway, and constructing the necessary culverts, drains and retaining walls. Five annual installments have been paid, and the plaintiff now seeks to enjoin the collection of the remaining five installments, on the ground that the property received no special benefits in excess of the amount paid.

The dwelling-house which is situated on this lot was built before Nixon street was opened, and was not designed for use and occupancy upon a corner lot. The approach to the premises from the side street is made difficult and inconvenient by reason of the steep grade. The chief benefit to the property consists in the improved appearance of the surroundings rather than any additional use appurtenant to the land. The real benefit from the improvement is derived by the public, and not the abutting owner.

Much of the testimony that the premises had been increased in value by reason of the improvement was based on the theory that the added light and air was a substantial benefit. But this was assured without the improvement, and can not therefore be considered. We are of the opinion that the special benefits received do not exceed the installments paid, and that the collection of those remaining should be enjoined.

Charles E. Tenney, for the plaintiff.

City Solicitors, contra.

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DISPUTED TITLE.

[Circuit Court of Lucas County.]

GEORGE CHALLEN V. JOHN V. MARTIN ET AL.

Decided, November 25, 1905.

Deeds—Ambiguity in—Giving Rise to Uncertainty as to Dividing Line—Agreed Line Becomes the Established Line, When—Not Contrary to the Statute of Frauds—Erroneous Lines Distinguished from Uncertain Lines.

In a suit in equity, where the parties on both sides are seeking to quiet their title to a strip of intervening land, and the court is confident from the evidence that the purpose of the original grantor was to give to his two sons-in-law equal portions of the disputed strip, and it was so understood by them, and a line midway of the strip was acquiesced in by them as the dividing line, and the occupation has not been of such a character as to give title by prescription, a decree will be granted making such line the established boundary between subsequent grantees and heirs, notwithstanding an ambiguity in the original deeds gives color to the claim of the plaintiff to a legal title in the whole strip.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

The case of George Challen v. John V. Martin et al is in this court by way of appeal. I can not do better, perhaps, than by reading the pleadings.

The petition states that the plaintiff is the owner in fee simple of the northwest quarter of Section No. 19, town three north, of range No. 9 east, in Jackson township, Wood county, Ohio; that said northeast quarter contains one hundred and seventy-nine acres, and that each of the defendants as widow and heirs at law of Robert M. C. Martin, deceased, claims some estate and interest adverse to plaintiff in and to east nineteen acres of said northwest quarter; but plaintiff avers that each of said defendants had no estate or interest whatever in and to said quarter section, or in and to any part thereof. Wherefore, plaintiff prays that he may be adjudged the owner in fee simple of said premises, freed from all claims or estate or interest therein of said defendants and each of them, and that he may have all other relief to which, in equity, he may be entitled.

The defendants, for answer to the petition of the plaintiff, say, that John V. Martin, Fannie Helper, Charles E. Martin, Eliza E. Sargent, Isaac Martin, Annie C. Derr, Jennie Lease, and Samuel Martin are the only heirs at law of Robert M. C. Martin, deceased, and that the defendant, Barbara Martin, is his widow; that on the 27th day of October, 1862, Abraham Kagy, who was then the owner in fee simple of the north half of Section No. 19, township three north, range nine east, containing three hundred and thirty-eight acres of land, deeded to Daniel Spitler the northwest quarter of said section, which said deed set forth as containing one hundred and sixty-eight and 86-100 acres of land, to Robert M. C. Martin, the northeast quarter of said section, which said deed set forth as containing one hundred and sixty-nine and 45-100 acres, intending thereby to divide said half-section equally between said Daniel Spitler and Robert M. C. Martin; that said deeds to Daniel Spitler and to Robert M. C. Martin were recorded on October 27th, 1861, and were recorded in Volume "T," pages 404 and 405, of the records of Wood county, Ohio; that the said Daniel Spitler and Robert M. C. Martin, ascertaining that the north and south quarter-section line did not divide said north half of said quarter section in two equal parts, and that the northwest quarter of said section contained one hundred and seventy-eight acres of land, and that the northeast quarter contained one hundred and sixty acres, entered into an agreement to have a line established dividing said half-section into two equal parts, and that the said Robert M. C. Martin should be the owner in fee simple of the land in said half-section lying east of said line, and that the said Daniel Spitler that lying west of said line; that thereafter, in the year 1879, in pursuance of said agreement, the said Daniel Spitler caused said line to be established and the corners of said two tracts of land were set 2.36 chains west of the west line of the northeast quarter of said section; that the survey establishing said line is recorded in the records of the surveyor of Wood county, Ohio, as survey number 776; that said Daniel Spitler was the grantor, through his heirs, to the plaintiff herein, of said northwest quarter of section number nineteen, township three north, range nine east; that since

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the year 1879 they have had open, notorious and adverse possession of nine and 45-100 acres off the east side of the northwest quarter of said section east of the line as established as aforesaid; that since the date of the conveyance of the northeast quarter of said section to Robert M. C. Martin, the said Robert M. C. Martin and his heirs have paid the taxes on the said nine and 45-100 acres off the east side of the northwest quarter of said section, amounting with interest to the sum of \$—; that said defendants are the owners of said strip of land off the east side of the northwest quarter of said section 2.36 chains wide, containing nine and 45-100 acres of land.

And the defendants allege that before the plaintiff parted with any valuable consideration for the said northwest quarter of said section, the plaintiff had knowledge and notice of the defendants' claim to said premises. The defendants deny each and every allegation in the petition contained, not expressly admitted herein. And for further answer to the petition the defendants say, that in the year 1903 the plaintiff rented of the defendants the said strip of land off the northwest quarter of said section, 2.36 chains wide, containing nine and 45-100 acres of land, and that the possession of said plaintiff of said premises is the possession of the defendants. Wherefore, the defendants pray that they may be adjudged to be the owners in fee simple of said strip of land off of the east side of the northwest quarter of Section No. 19, township three north, range nine east, 2.36 chains in width, containing nine and 45-100 acres of land, free from all claims or estate of the plaintiff, that the title of the defendants thereto may be quieted as against the plaintiff, and to all relief to which, in equity, they may be entitled.

For reply to the answer and cross-petition of the defendants the plaintiff represents and says to the court: That he admits that the parties named in said answer are the only heirs at law of Robert M. C. Martin, deceased; admits that on the 20th day of October, 1850, Abraham Kagy, by deeds duly executed, and who was then the owner in fee simple of the north half of Section No. 19, town three north, range nine east, deeded to Daniel Spitler the northwest quarter of said section, and to Robert M. C. Martin the northeast quarter of said section;

admits that said deeds so executed were recorded in Volume "T," pages 404 and 405 respectively, of the records of deeds of Wood county, Ohio; admits that Daniel Spitler, through his heirs, was the grantor to plaintiff herein of the northwest quarter of said Section No. 19, township three north, range nine east, but denies each and every other allegation in said answer and cross-petition made, set forth and contained and not herein specifically admitted. And for further reply herein plaintiff says, that in the original survey of the north half of Section No. 19, the excess therein over and above eighty acres for each half quarter section in said north half of said Section No. 18, contained under said original survey ninety-eight acres of land; and since the time of said original survey no change has been made therein. Wherefore, plaintiff prays as in his petition herein.

It appears from the pleadings, as well as from the evidence, which we have here, that the controversy is about a strip of land containing about nine acres, lying along a part of the east side and off a part of the northwest quarter of section nineteen in Jackson township. The action is brought by the plaintiff to quiet his title to this strip of land. The defendants on the other hand assert their ownership to the strip, and they desire to have their title quieted. It appears that this land was conveyed by the United States government to Andrew Hite by two patents of the date of August 10, 1837, the patents conveying to him all the north half of that section; the one patent covering the north half of the northwest quarter, and the north half of the northeast quarter, containing one hundred and sixty-nine and forty-two-hundredths of an acre; the other patent covering the south half of the northwest quarter, containing eighty-nine acres and forty-four hundredths of an acre, and the south half of the northeast quarter, containing eighty acres. It appears from these patents that the amount of land contained in these tracts was about a hundred and sixty-nine acres. In one it is mentioned as 169 and 44-100 and the other 169 and 42-100, but in this discussion I will omit the fractions because they are not essential. I shall only say that what is said about them in the description confirms the view that we take as to what was intended by the parties.

By certain conveyances the title to all this north half of the section was vested in one Abram Kagy about the middle of the last century. Kagy was the assignee of all this north half of the section, and by two deeds of a certain date, October 27, 1852, he conveyed all of this north half of the section to his sons-in-law, Spitler and Martin. To Spitler he conveyed the northwest quarter of the section, and to Martin he conveyed the northeast quarter of the section. It seems that he was aware of the fact that there was in this half section more than three hundred and twenty acres; that it overrun about eighteen acres. His purpose seems to have been, however, to divide the tract evenly between his two sons-in-law. It would appear from the deeds that they were purchasers and paid equal consideration for the amount conveyed to them; so he describes the amount conveyed to one as being one hundred and sixty-nine acres, or about that, and the amount conveyed to the other as a hundred and sixty-nine acres, or about that. As a matter of fact, the government survey, which was shown to us and is in evidence, discloses signs of this overplus to the west eighty acres of this half-section, and perhaps if there was no more in these deeds than a description of these subdivisions of the survey, the part deeded to Spitler would have carried the whole overplus of eighteen acres, and the deed to Martin would have carried the hundred and sixty acres; and perhaps it is true that even with what appears in the deeds in addition to the description of these subdivisions that legal title to no more than one hundred and sixty acres was conveyed to Martin and that legal title to one hundred and sixty acres and that additional eighteen acres was conveyed to Spitler, but we have to consider here more than the bare naked legal title of the parties; it is a suit in equity and the equitable action of the court is invoked and required.

Notwithstanding what may have been the result with respect to the legal title, we are entirely confident from the evidence that the purpose of Mr. Kagy was to give to each of his sons-in-law an equal portion of this tract of land and that it was so understood by grantor and grantees. The plaintiff in the case has, by conveyances, become the owner of the portion conveyed to Spitler; the defendants in the case are the owners of the north-

east quarter of the portion conveyed to Martin. Mr. Challen, the plaintiff, became the owner of the northwest quarter some two years ago. In 1879 Martin and Spitler came together and took to their aid a surveyor and undertook to divide this property up in accordance, apparently, with their understanding of their rights in their respective deeds. They knew where the government survey located the line between these quarter sections; they knew where that line was, that was used as a starting point from which to determine a new line to divide their two tracts of land, and a new survey was made locating the line about eight rods west of the line of the government survey. The width of the strip, I believe, is 2.36 chains.

It does not appear to us from the evidence that there has been any adverse possession of this disputed strip, which is the east nine rods, since that time; that is to say, we do not find the grantors of the plaintiff have occupied it at any time in an adversary way. Nor do we find that the grantors of the defendants or the defendants have occupied it in such a way that they could have acquired a title to it by prescription. That part of the territory has, during most of these years, been undeveloped, uncleared, and woodland, and in no fit condition for cultivation. A little strip upon the north part was cleared up some twenty or twenty-two years ago, but the most of it has during most of these years since the survey was made been woodland. There has been no fence run between the lines since this survey was fixed by stones set. What was done suggesting any adverse claim appears to have been done by mistake of the occupiers or by acquiescence. The intention of the parties was to fix this line between them and to claim up to the line ever since, and this has been done by each and has been done by acquiescence of the other in each case. There has been no dispute about that. The mutual intent and purpose has been quite manifest.

It has been urged on behalf of the plaintiff that this has not been effective to transfer the title of these nine acres to the defendants; that this is not a question of fixing a disputed boundary; not a question of fixing a boundary line at all, but it is a question of an attempt to transfer the title to nine acres of land from one to another.

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We do not take that view of it. We think there is enough in the deeds from Kagy to give rise to the doubt of the ownership of this strip of land; that the description of the number of acres in the deed was enough to give rise to an ambiguity, that the fact that these parts were described as subdivisions of the section is not enough to vest with absolute certainty so that there can be no doubt about the line between the tracts, and whenever there is such uncertainty, the authorities are clear that the parties can fix the line, and this would not be contrary to the statute of frauds. It seems to us from the consideration of certain cases cited to us that even if this were not so, even if it were a matter of admitting of uncertainty, that still the parties might agree upon the line of demarkation between their respective tracts, and holding up to such line for twenty-one years would fix the title of the parties up to the line.

I can not take time to review the authorities that have been cited. I will say that the cases cited will be found in 7 O. S., 99; 21 O. S., 258; 21 O. S., 115; 16 N. Y., 354; 128 U. S., 691; 35 Pa. St., 409; 30 O. S., 417; 17 O. S., 130. We have examined these cases and other cases. In the case of *McAfferty v. Conover*, in 7 O. S., 99, which was an action in ejectment, Judge Swan, in starting out in his opinion, says:

“No doubt the rights of these parties could be readily adjusted, and upon just principles in a court of equity. Our inquiry now is: What are their rights at law?”

And so he proceeds to inquire into that question, and, reading from page 106:

“Thus where the true lines are in fact unquestionable, and parties, by mistake, agree upon an erroneous line as their boundary line, and suppose the line agreed upon to be their true line and fence to it, their acts and declarations do not operate in the nature of an estoppel. A party will not forfeit his estate by a mere mistake; nor can the statute of frauds be thus evaded. Something more is required to transfer the title. If there has been acquiescence, adverse possession, and improvements made in accordance with such erroneous line, under such circumstances as that the owner is chargeable with gross negligence amounting to fraud, an estoppel *in pais* may probably permanently establish the erroneous line.”

Well, that is not in this case. It is not a case of an erroneous line being agreed upon by mistake of the parties. The parties with their eyes wide open agreed upon these lines. Judge Swan, continuing, says:

“There is another class of cases where the line between the owners of land can not with certainty be ascertained; and because uncertain, they agree upon and establish the line. Such agreement settles the line; not by estoppel, but by agreement.”

A case very near like the kind of a case referred to by Judge Swan, is that of *Bobo v. Richmond*, found in 25 O. S., 115, and yet the case differs in this that there was not an uncertainty about the true line. It is similar to the case at bar in other respects; that is to say, there was not an uncertainty as to the true line of survey of these quarters. Nevertheless, the court held in that case where parties agreed upon a line and held up to it that that should determine their rights. I shall not take time to read from this decision, but I will call attention to the dissenting opinion of Judge McIlvaine, emphasizing the point that was decided in court. On page 126, he says:

“The grounds of dissent will readily appear from the above statement of the case. It will be observed that the case, as presented to us upon the record, as I understand it does not involve any question under the statute of limitations. The defense of twenty-one years of adverse possession must be regarded as having been abandoned by the defendant. Such was the effect of his disclaimer made in open court, at the trial. Nor does the judgment rest upon the doctrine of ‘an agreed line.’ There is no pretense that there was doubt or dispute, at any time, as to the location of the true line between the east and west halves of the quarter section.”

Judge McIlvaine seems to have entertained the idea that is urged by counsel for plaintiff, that in order that the doctrine of “an agreed line” shall take effect, there must be doubt, dispute and uncertainty. We think that there was ground for doubt here, but we do not deem that essential in view of this decision of the Supreme Court.

The equities of this case, it seems to us, are very clearly with the defendants. The plaintiff bought with the understanding that he was only receiving a hundred and sixty-nine acres, and

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he paid a certain price per acre, and only paid for a hundred and sixty-nine acres.

Soon after he bought this land he conceived the idea that he had title to this strip. If he had the legal title to it, it was purely technical. The equities are against him, and our view of the matter is, to conclude without further discussion, that the petition should be dismissed, prayer denied, and decree in favor of the defendants upon the cross-petition.

Edward Beverstock, for plaintiff.

James O. Troup and *F. P. Riegle*, for defendants.

TITLE BY ADVERSE POSSESSION.

[Circuit Court of Fairfield County.]

CHARLES W. MCCLEERY V. HENRY F. ALTON.

Decided, September 21, 1906.

Adverse Possession—Evidence as to Line of Old Fence—And of the True Dividing Line—Injunction against Maintenance of a Structure—Will Not Lie, When—Ripening of Rights Through the Erection of a Permanent Structure Without Protest—Title—Evidence.

1. In the absence of a license which precludes the possibility of a claim of adverse possession, or the execution of an agreement in accordance with law granting the right of occupancy for a fixed period, the placing of a permanent structure on the land of another constitutes adverse and hostile possession under which title may be claimed after twenty-one years.
2. Moreover, if the trespasser is permitted to expend a large sum of money in the erection of a permanent building without protest from the owner of the land, or any attempt by the owner to assert his rights for a long period, equity will not favor a late assertion of such stale rights by injunction, but will leave the parties to their remedy at law, or if estoppel is pleaded will lean favorably toward such a defense.
3. The right to maintain the projection of the eaves of a building over the land of another becomes absolute at the end of twenty-one year, equally with the right to maintain a foundation or superstructure.

DONAHUE, J.; TAGGART, J., concurs.

This case comes into this court on appeal; and the petition and answer thereto simply raises the question as to the location of the old fence between the lots of plaintiff and defendant. The cross-petition of defendant, however, raises the question as to the true line between these properties, at least as to that portion thereof corresponding to the length of the kitchen on plaintiff's premises. Upon this cross-petition it is sufficient to say that the evidence without conflict shows that this building has been erected for more than twenty-one years prior to the commencement of this action. A building of a permanent structure upon another man's real estate is an adverse and hostile possession, unless it be shown that it was under a contract and agreement executed under the laws of our state by which the right to do so was granted for a certain definite time, or by mere license that precludes the possibility of claim of adverse possession. So that upon this cross-petition the defendant must fail without reference to where the true lot line is. Indeed, it is not necessary that a structure of this kind should occupy for twenty-one years in order that a court of equity would refuse to interfere by injunction compelling its removal. For if the owner of a lot permits his neighbor to expend large sums of money in the erection of permanent buildings upon his property without protest or warning of any kind whatever, or without taking early and prompt action to assert his rights, equity will not favor a late assertion of such stale rights and will leave the parties to their remedy at law, or where estoppel is pleaded will lean favorably to such defense.

In this case, however, no such defense is interposed. The defense is placed solely upon occupancy for twenty-one years which at law or equity is a good and sufficient defense. So that upon this branch of the case the court has little difficulty.

Coming now to the principal issue joined between these parties, that is as to the location of the old fence, the matter is not as easily settled, nor are we so certain in our conclusions, for there is a mass of conflicting evidence here that is hard to reconcile.

It is insisted in argument that even if the old fence were where plaintiff claims it was that the mere occupancy of the property up to that line by plaintiff or his tenants without claim of right would not prevent the placing of the fence at this time on the true line. In other words, that the possession must be adverse, exclusive and hostile and under claim of right, but we do not find that issue made in the pleadings. The answer of the defendant insists that he is the owner of that property, not only because it is the true lot line where the fence now stands, but because he and his predecessors in title have used and occupied it up to that place, for more than twenty-one years, to-wit, about forty years. Nor does he deny that the plaintiff used and occupied it on the other side of the fence up to where it stood prior to the change, for an equal number of years. In fact both parties rest their contention upon their conflicting claims as to the location of the former fence. The evidence offered by plaintiff is clear, positive and convincing that the end of the fence at the southwest corner of the kitchen was at least fourteen inches to the west of its present construction. From that point to the rear of the lot the evidence is not so satisfactory. It is true that there is evidence by the defense disputing this location at the north end of this fence, but the majority of plaintiff's witnesses have more recent acquaintance with this fence and their memory therefore ought to be better. True, some of the witnesses who built this fence say that they knew at the time that it was placed exactly upon the location of the old fence. That is very strong proof and but for some circumstances we would not say that the plaintiff had furnished any preponderance of evidence upon this point.

The first important circumstance to our minds is found in the evidence of Mr. Nixon, who says that at the time this fence was being erected, he called defendant's attention to the fact that it was not being placed on the line of the old fence, as he had agreed to place it, and the defendant then insisted that he was putting it on the true line as established by the Wolfe survey, and at that time made no claim whatever that he was putting it on the line of the old fence. If he thought he was putting it on the line of the old fence, then was his time to make such

contention. Again, when Mr. McCleery came upon the premises he made the same complaint that Nixon had made to defendant. that is, that it was not being placed on the line of the old fence. and again defendant failed to make any claim that it was being so placed, but insisted to him that he was putting it on the true line as established by the Wolfe survey, and that he had the right to place it on the true lot line. This evidence is undisputed and to our minds it is of controlling effect, for that was the time that the evidence of the location of the old fence existed, and that was the time for the defendant to make the claim upon which he relied. So we are forced to the conclusion that he then relied upon the true line and not upon the belief that he was establishing it on the line of the old fence.

And there is another circumstance of material aid; and that is that the defendant volunteered to disturb and replace that portion of the old fence then existing without consultation with the owner of the other lot, or without there being any duty or obligation resting upon him so to do, and if in doing this he did so obliterate the line of the old fence that witnesses now disagree as to its exact location, justice and equity require that any doubt shall be resolved against him, for he is the responsible party in destroying the evidence upon which the court might have reached absolutely correct conclusion as to the exact location of this fence.

On the other hand the defendant has offered some strong evidence as to the location of the old fence adjacent to his factory. We have taken the trouble to go upon the premises and examine what the defendant says is a remnant of an old post on the line of the old fence, and also some holes that would indicate that they were some post holes of this old fence, and undoubtedly there is much weight in his claim that this remnant of the old post was a part of the old fence, and that the only difference now is that the boards are nailed upon the opposite side of the post; but even conceding that to be the fact he had no right to go upon plaintiff's premises to erect such a fence, but if he determined to erect that fence on his own responsibility, he must put it wholly upon his own premises. It is only where parties agree to a partition fence and join in its construction,

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that it may be placed half and half upon the property of each.

There is also some pretty strong evidence offered in this case that the east side or end of the factory is now further to the west than the same side of the old factory, but from the transcript of the evidence taken in the common pleas court in this case it does appear that defendant testified positively that these lines were identical and that the new factory extended to the east side just as far as the old, and that being true it clearly appears that the old fence was not the same distance east of the old factory that the present fence is east of the new. We are inclined, however, to believe that this new factory is probably a few inches west of the east line of the old. We can not understand how it could be constructed in the manner it was constructed without at least getting a few inches to the west, but upon the whole evidence, we think that the distance is very trifling and not more than two or three inches at best.

Upon the whole contention, therefore, we have reached the conclusion that a very small portion of the projecting eave at the southwest corner of the kitchen projects over defendant's land, but that as we have already said, he is entitled to continue and maintain, because of the fact that he has already occupied that space with this building for more than twenty-one years, and the right to maintain the projection becomes absolute, equally with the right to maintain a foundation or the rest of the superstructure.

We further think that the old fence throughout its entire length was fully fourteen inches to the west of its present location, and that the same finding and judgment may be entered here as was entered in the common pleas court.

The motion of the defendant for a new trial will be overruled and twenty days given for a separate finding of fact and conclusions of law and the statutory time for the filing of a bill of exceptions. Exceptions of defendant are noted as to each and every finding and ruling of this court herein and cause remanded to the common pleas court for execution.

M. A. Daugherty and F. M. Acton, for plaintiff.

William Davidson and W. T. McClenaghan, for defendant.

FAILURE TO ALLEGE CONSIDERATION.

[Circuit Court of Hamilton County.]

KEHM V. INSURANCE COMPANY.

Decided, December 8, 1903.

Pleading—In an Action on a Policy of Fire Insurance—When Consideration for a Contract Must be Alleged—Omission of Allegation in Amended Petition.

In an action on a policy of fire insurance an amended petition which fails to allege any consideration for the contract is demurrable, notwithstanding the original petition supplied the omission.

SWING, J.; JELKE, J., and GIFFEN, J., concur.

This case is in this court on error to the judgment of the court of common pleas in sustaining a general demurrer to the amended petition of plaintiff. It is urged in this court that the demurrer was properly sustained for the reason that the amended petition does not allege any consideration for the contract which it is sought to have reformed, and when reformed to have enforced. There is no consideration alleged in the amended petition.

The authorities are numerous and uniform to the effect that a consideration must be alleged in actions founded on a contract except upon instruments under seal and negotiable promissory notes and bills of exchange, where by statute no consideration need be alleged (4 Ency. P. & P. p. 928 and authorities therein cited.) But while not controverting this rule of law it is contended that an answer which was filed to the original petition supplies this omission and should be considered by the court. This action was originally brought on a policy of insurance. In this action the plaintiff alleged the payment of twenty-four dollars in cash and the giving of a note for one hundred and twenty dollars, and the issuance to him of a policy of insurance for \$2,000, and the destruction of the property insured by fire; and he asked judgment for the amount insured.

The defendant answered setting up an avoidance of the policy by reason of procuring other insurance without the consent of the insurer. Such proceedings were had, that the plaintiff

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iff found it necessary to file the amended petition, *supra*, asking for a reformation of the policy and when reformed for a judgment on it, thus changing the form of this action from one at law to one in equity, and to this amended petition the demurrer was sustained.

It seems to us clear that all the court could consider in passing on the demurrer to the amended petition was the demurrer and the amended petition. The original petition was out of the case and so was the answer to it. In the case of *Raymond v. Railway Co. et al*, 57 O. S., 271, the first proposition of the syllabus is as follows:

“Under our system of pleading, a plaintiff may be permitted to substitute an amended petition in place of the original, which may have the effect to change the form of action from an equitable to a legal action, the basis and the ultimate object of the action remaining the same. And if such change is made the court in determining the issues to be tried will look wholly to the amended pleadings, disregarding the original and the cause will thereafter be treated as a suit at law and will proceed to trial and judgment as though it had been commenced as a legal action.”

In the opinion of the court, at page 284, Judge Spear says:

“But if the new pleading appears to have been filed not by way of addition merely to the original petition, and if it appears also to contain a full statement of the plaintiff's case, being on its face a statement of an entire cause of action and in substance a substitute for the original, the filing of it by the plaintiff will be regarded as implying an abandonment by him of the case made in the original petition and any additions thereto, and as selecting this as the pleading on which he founds his suit, and the only petition which the court is to consider in determining the issues to be tried.”

It seems to us that this case is in point, and is controlling on the question raised in the case at bar. It is evident, therefore, that we can consider only the amended petition and the demurrer, and as there is no consideration alleged for the contract sought to be enforced, it is not enforceable. It follows from these conclusions that in our judgment the court properly sustained the demurrer. Whether it should have been sustained

for other reasons or whether the court erred as a matter of law in sustaining it for other reasons, need not now be considered by this court.

Judgment affirmed.

Goebel & Bettinger, for plaintiff in error.

John R. Sayler, for defendant in error.

JURISDICTION IN EQUITY.

[Circuit Court of Hamilton County.]

GEORGE G. FLEUROT V. CLARA B. FLETCHER ET AL.*

Decided, March 2, 1903.

Appeal—Equitable Jurisdiction—Right to have a Deed Declared a Mortgage, and the Transaction a Loan.

Where it is sought to have a deed declared a mortgage and the mortgage foreclosed the action is purely equitable and an appeal will not lie.

SWING, J.; JELKE, J., and GIFFEN, J., concur.

The petition in this case alleged that plaintiff loaned defendants \$15,000 for a term of three years, receiving as security a deed in fee simple to certain real estate, and giving a lease back to the defendants; that the said loan had not been repaid, and that the deed was in fact a mortgage; and praying for a foreclosure and sale of the said property.

The motion to dismiss the appeal in this case should be overruled. Plaintiff's cause of action is purely equitable. No right to a jury existed. The right to have the deed declared a mortgage and the right to have the transaction declared a loan for \$15,000 was wholly within the jurisdiction of a court of equity, and could not be tried to a jury. Whether or not a case is appealable depends upon the relief sought, and here it is equitable.

Drausin Wulsin and *Ben B. Dale*, for the motion.

Maxwell & Ramsey, for the defendants.

*Affirmed by the Supreme Court without report, 73 O. S., 381.

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DAMAGES FOR FAILURE TO DRILL OIL WELLS.

[Circuit Court of Wood County.]

THE CROWN OIL COMPANY v. ALBERT P. PROBERT.

Decided, November 25, 1905.

Lease—Of Oil and Gas Lands—Failure to Drill Agreed Number of Wells—Stipulated Damages—Option to Treat Lease as Abandoned—Penalty.

1. The provision in an oil lease that "in case no well is completed within ninety days from this date then this lease shall be null and void," does not give to the lessee the option of treating the lease as null and void and abandoned, and thereby exonerate himself from liability under a stipulation to pay in default of drilling a second and third well.
2. The provision that after the completion of the first well "the second party shall drill two additional wells at intervals of ninety days, and upon failure to drill said wells or any one of them, it (the lessee, shall forfeit and pay to said first party the sum of one hundred dollars for each well not drilled," does not provide a penalty, but is a provision for stipulated damages.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

This action was brought in the court of common pleas by Albert B. Probert against the Crown Oil Company to recover certain sums of money which he alleges were due to him and which he claims upon a certain oil lease, between the parties, Probert being the lessor and the Crown Oil Company the lessee.

The petition sets forth that this lease was executed on the 23d of July, 1903, and covered a certain eighty acres of land in this county, and contains the averment that the defendant under and by virtue of the terms of said lease was required to drill a well upon said premises within ninety days from the execution of said lease, and two additional wells at intervals of ninety days apart from the completion of said first well. It was further stipulated and agreed therein that if the defendant should fail to drill said wells or either of them the defendant should forfeit and pay to plaintiff the sum of one hundred dollars for each well not drilled. It is also averred that there was a

certain stipulation in the lease which required the lessee to free the property of a certain lien, and the third cause of action is based upon the alleged default of the defendant below with respect to that stipulation. Such action was taken in the court below with respect to that cause of action, that no question is presented to this court upon it.

It is averred that this first well was drilled in due time, and the first cause of action is a claim for one hundred dollars on account of the default of the defendant with respect to drilling the second well. The second cause of action is a like claim for a like amount with respect to the alleged default of the defendant in drilling the third well. The petition sets forth a copy of the lease. A demurrer to the petition was overruled and thereupon the defendant took leave to answer, and the answer is as follows:

“The defendant admits its corporate existence, the execution and delivery of the lease by plaintiff, as alleged in the petition, and denies all the other allegations in the petition contained. Defendant says that it entered on said premises and drilled and completed one well within the time specified in the lease for the completion of a well, and that said well did not produce oil or gas in any quantity, and thereupon the defendant abandoned said premises by pulling the casing and all pipe and fixtures and removed them from the premises described in said lease, and offered to surrender the lease to said plaintiff. Defendant further says that the amounts sued for in the first two causes of action, by plaintiff, was intended as and for a penalty to insure the fulfillment of the terms of said lease, and was in nowise intended as and for any part of the consideration for said lease? Defendant further says that there was no consideration for the promise mentioned in said causes of action of plaintiff. Wherefore, defendant prays that it may go hence and recover its costs herein expended.”

No reply was filed and the case was submitted to the court below upon the motion of the plaintiff for judgment upon the pleadings. It will be observed by the first clause of the answer that all other allegations of the petition excepting those with respect to the corporate capacity of defendant and the execution and delivery of the lease are denied, and yet by subsequent allegation, all the other material allegations of the petition ap-

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pear to be admitted, so that the case stands practically upon the petition with the additional allegations in the answer that after the drilling of the first well the defendant abandoned the premises, and the allegation that these stipulated amounts to be paid upon default of the drilling of the second and third wells were intended as and for a penalty to insure the fulfillment of the terms of the lease. This last allegation of course is not an allegation of a matter of fact.

There is no allegation of any mistake in the terms of the lease; no effort to have the lease reformed, and the intent of the parties is to be determined from the instrument. The lease stipulates "that for the receipt of one dollar, the receipt of which is hereby acknowledged, and also for the consideration of the covenant hereinafter mentioned, has granted, demised and let unto the said party of the second part," the oil company, and then follows a description of the premises and the terms of the lease, which I need not read as a particular clause in controversy here. Then the lease contains this provision: "In case no well is completed within ninety days from this date (unavoidable accident and delays excepted), then this lease shall be null and void." That is the only stipulation we find in the lease, the non-performance of which shall result in rendering the lease null and void. That stipulation was complied with. The well was drilled. Further on in the instrument we find this:

"It is further agreed that after the completion of the well, second party shall drill two additional wells at intervals of ninety days, and upon a failure to drill said wells or any of them, it shall forfeit and pay to said first party the sum of one hundred dollars for each well not drilled."

As we understand the argument of plaintiff in error based upon the answer that this lease was abandoned, it is the contention of counsel that they might abandon the lease and thereby exonerate the lessee from all liability under the clause of the requirement that it shall drill or pay upon default of drilling, and counsel seems to base his contention upon the case of *Kelly v. Van Etten*, 66 O. S., 605. But that lease was materially different from this one at bar. It contained this stipulation:

“In case no well is completed within thirty days from this date then this grant shall become null and void unless second party shall pay the first party thirty dollars each and every month in advance while such completion is delayed.”

That stipulation is similar to the one contained in the lease at bar with respect to the first well to be drilled, but there is no such stipulation in this lease with respect to subsequent wells.

With respect to this stipulation it was held in the Van Etten case that this did not constitute a promise or obligation to pay rental, and it was held further that the lessee had the option to complete wells or pay rentals to keep the lease alive; and that upon breach of the agreement to complete wells, no action would lie for the recovery of rentals. And on page 611, Judge Burket, delivering the opinion of the court, distinguishes it from the case of *Woodland Oil Company v. Crawford*, 55 Ohio St., 161; pointing out, “that in that case the lessee agreed to drill certain wells and, upon failure, to pay certain rentals, and it was held that the lessor might elect to enforce the contract to drill, or waive that and enforce the promise to pay rental. There the option was with the lessor. Here, as there is no promise to pay rental, the option is with the lessee, either to drill or pay rental to keep his lease alive, and failing in both, the lease becomes null and void, with an option however in the lessor to treat it as void, or to sue for damages for breach of the contract to complete the wells as specified in the lease,” his right being for damages rather than for rental.

The lease in the case at bar is also materially different from that which the court had under consideration in the case of the *Woodland Oil Company*. Neither of these cases seem to be of very great value in considering the question which we have submitted to us here. It is sufficient to say that there is no option in the lessee to regard this lease as null and void and abandon it, and thereby exonerate it from liability under this stipulation to pay in default of drilling the second and third well.

The only question remaining, or the only one that it seems to us requires much consideration, is that suggested as to the effect of this stipulation; whether it is a stipulation to pay stipulated damages on account of this default or a stipulation

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for a penalty, and determine that we must look to the instrument, and we may consider what is universally known respecting the business that is contemplated, the action, operation, and probable results of it. Certain rules upon the subject which we think sufficient for the purpose here are very well and very tersely stated in the 19 Am. & Eng. Ency. of Law. The subject is taken up at page 395. I shall read from the text at pages 389, 399, and especially from pages 401 and 402. It is upon the subject of construction of contracts in case of doubt, and I may say that it is our opinion that there could be no doubt about the intent here to make this stipulated damages, were it not for the phrase "forfeit and pay." Had the word "forfeit" been omitted, we would have had no doubt about it. The text reads:

"1. [*General Rule.*] A frequent statement by the authorities is that the true solution of the whole question of liquidated damages as distinguished from penalty is to be found in the intent of the contracting parties, to arrive at which it is proper to consider the instrument as a whole, the situation of the parties, the subject-matter of the contract, and all the circumstances surrounding its execution. And in addition to this, it has been held to be permissible to prove the value of the property that a party has contracted to convey or deliver, if the contract is of such a nature, as well as the consideration moving from the other party therefor, as a criteria to aid in ascertaining whether a sum to be paid on default is a penalty or liquidated damages.

"2. [*Qualifications of the General Rule.*] The doctrine that the intent of the parties to the contract, when ascertained, controls its construction as to the provision for liquidated damages or penalty, can not be accepted without qualification.

"The intent of the parties will not be regarded, if illegal, in its object, nor will it be effectual if the result would be manifestly to disregard the rule of compensation as damages for the breach of the contract. Again, if the contract was for the payment of money, no stipulation of the parties will be allowed to supersede the measure of damages established by law for the breach of contracts to pay money, namely, legal interest.

"6. [*Language Not Conclusive.*] No rule as to distinguishing between liquidated damages and penalties is better settled than that the language of the parties to the contract and the terms employed descriptive of the amount to be paid are not con-

clusive of the interpretation and legal effect. Thus a sum denominated 'liquidated damages' by the parties, may nevertheless be held to be a penalty, and though the word 'penalty' be used, the sum so termed may be deemed liquidated damages. Where, however, the term 'penalty' is employed, the doctrine of some cases is that it is to be regarded as more nearly conclusive of the intent of the parties than in the opposite case where the language is 'liquidated damages.'

"To the use of the terms 'forfeit,' 'forfeiture,' or 'forfeit and pay,' no very uniform meaning has been ascribed. In some cases such terms have been held to import a penalty, in others liquidated damages. The true rule is that the construction to be given to such phraseology will depend upon its connection with the other parts of the instrument, in the light of all the surrounding circumstances.

"One of the most universally recognized indications that a penalty was intended, and not a mere liquidation of the damages, is that the actual damages on a breach of the contract would be readily ascertainable. Or perhaps the proposition more accurately stated is that this consideration is frequently determinative of the construction which the courts will adopt, irrespective of the intent of the parties.

"Where the contract is of such a nature that the actual damages on a breach would not be readily proved and recovered as such, the courts incline strongly to the view that a sum named therein was intended as a liquidation of the damages of the parties. It has been held indeed, that the only cases in which the courts will carry into effect an agreement to pay a fixed and stipulated amount of damages are those of such nature that the damages resulting from a breach are not regulated with certainty by any rule of law and can not be readily ascertained by a jury. In proportion therefore, as the difficulty of ascertaining the actual damages by proof is greater or less where this difficulty grows out of the nature of such damages, in like proportion is the presumption more or less strong that the parties intended to fix the amount as liquidated damages."

Now that is a general statement of the rule. There are a great many authorities and a great many illustrations cited, but as I say, in this case we believe we have a right to consider what we know about the business of producing oil; what is universally known. This oil and gas lease was given in order that the lessor might derive the profits of the royalty stipulated for. In lieu of the royalty in the event that the wells are not drilled,

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he is to have a hundred dollars for each well. The amount does not suggest a penalty, and that fact taken in connection with the other fact that the damages resulting from a failure to comply are not usually ascertainable, indeed, it may be said, I think, can be scarcely ascertained at all with any degree of certainty, it would be mere guess work to fix the damages; and in view of these things we regard the amount so referred to by the parties and upheld by the court, to be stipulated damages, and holding this view, we affirm the judgment of the court below.

Earl D. Bloom, for plaintiff in error.

Baldwin & Harrington, for defendant in error.

FINAL ORDER IN AN ACTION TO ASSESS STOCKHOLDERS' LIABILITY.

[Circuit Court of Franklin County.]

F. M. MARRIOTT (CONSOLIDATED) v. THE C., S. & H. R. R. Co.

Decided, June, 1906.

Appeal—Action to Enforce Stockholders' Liability—Determination as to Some of the Stockholders—Not a Final Order—Jurisdiction by Consent.

An order made in the common pleas court in an action to enforce stockholders' liability, which determines the liability of some but not of all the defendant stockholders, is interlocutory and not appealable.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

Upon a discussion of the form of entry to be made herein (based upon a former opinion of the court) it was suggested for the first time that the issues as to certain parties herein (alleged stockholders) had not been determined by the common pleas court, but had been expressly reserved.

The attention of the court had not previously been called to that fact, either in brief or oral argument, or by any of the numerous counsel engaged in the case; nor had it been observed by the court.

It presented at once an embarrassment to the final settlement of the case, which the court suggested might possibly be remedied by a unanimous consent that such issues be considered and disposed of by this court, before final judgment upon the whole case.

Unanimous consent could not be obtained to that plan; and the court, on reflection, is of the opinion, that even by unanimous agreement, such issues could not legally have been brought into this court, without a previous determination of the court below.

We are brought, therefore, face to face with the very serious question as to whether this court has any jurisdiction at all, in view of the failure of the lower court to determine whether certain parties were liable or not as stockholders.

Upon the theory that the case is inseparable so far as determining the ratable liability is concerned, we held that the appeal of one party brought up the whole case.

Conversely, is it not true, that the failure of the trial court to pass upon the liability of one party prevents an appeal by the remainder?

There can be no final judgment rendered until all the issues as to liability are determined; because the determination of any one of them would either increase or diminish the pro rata liability of the remaining stockholders.

We are of the opinion, therefore, that the order of the common pleas court of July, 1905, was interlocutory and not final. *Bank v. Walters*, 1 O. S., 201.

The Supreme Court, in the case of *Mason v. Alexander*, 44 O. S., 335, makes a very proper distinction between cases where the debts of the corporation undoubtedly exceed the liability of all the stockholders, and cases where a partial assessment, only, is necessary. Spear, J., says:

“The position would be different if it were necessary to order contribution, an adjustment of equities, and an equalization of burdens among stockholders. But that necessity, we have found does not exist here. The liability of no stockholder, against whom a judgment was rendered, could possibly be increased or diminished by the disposition of the issues to be determined later.

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The debt of the corporation, as found by both referees, and not disputed, far exceeded the capital stock. So that, in any possible event, every stockholder that could be holden at all was liable for an amount equal to his stock."

In our former opinion, we referred to the liability of the stockholders for the face value of their stock, but did not say that we would render judgment for that amount.

We preferred to consider further the question of amount, especially as to the margin to be allowed to cover costs (including counsel fees) and the various contingencies liable to happen before final settlement.

Under the findings of the master, there seems to be no necessity, even to cover contingencies, to render judgment for one hundred per cent. Therefore, the holding in *Mason v. Alexander* does not come to our relief. The case being undisposed of, in vital respects, in the common pleas court, is not appealable and we have no jurisdiction.

The suggestion of certain counsel, that creditors will waive, so far as the remaining parties are concerned, the proportionate liability of those whose issues were undisposed of below, does not relieve the situation. The old proposition that consent can not give jurisdiction, arises. The order, we must find, was interlocutory and not final.

The question as to fees of counsel, therefore, is not before us. Nor is it necessary to indicate our views as to the full amount of the judgment to be rendered, to pay which an assessment of only twenty-five per cent. of the stock seems to be at present required.

The appeals will be dismissed.

Stewart & Rector, for plaintiff.

W. O. Henderson et al, for defendants.

REMOVAL OF GUARDIAN.

[Circuit Court of Lorain County.]

IN RE GUARDIANSHIP OF JAMES EDWARD MURRAY.*

Decided, September 28, 1906.

Appeal—From Refusal to Remove a Guardian for Lack of Jurisdiction to Make the Appointment—Standing of an Uncle in Such a Proceeding—Domicile of Minor Determined. How—Meaning of the Word "Resident" as Used in Section 6254.

1. The interest of an uncle in the welfare of a minor nephew gives him standing in a proceeding for the appointment of a guardian for the minor.
2. Conversely, a motion by an uncle for the removal of a guardian on the ground of lack of jurisdiction to make the appointment sufficiently challenges such jurisdiction, and such a step being equally a special proceeding with that of making the appointment, carries the right of appeal to the common pleas on the overruling of the motion.
3. Inasmuch as the grandparents of this minor stood in the relation of parent to him, the residence of the grandparents is his residence, and jurisdiction to appoint a guardian is in the probate court of the county of their residence.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

James Edward Murray is an infant, now about seven years of age. His father was Patrick J. Murray. His mother's maiden name was Moroney. Both are now dead.

At one time these people lived in Athens county in this state. James Edward was born there. Mrs. Murray was threatened with or attacked with pulmonary disease, on account of which they broke up their home at Athens in the fall of 1903, selling a part of their goods and storing the remainder, and went to the state of Texas. After remaining in that state for a few months, until probably March or April, 1904, Mrs. Murray not getting better, they returned to Ohio, stopping for a few weeks with Mrs. Murray's sister, at Toledo, and then in May, 1904, going to the

*Affirming *Re Guardianship of James Edward Murray*, 4 N. P.—N. S., 233.

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home of Patrick's parents in Wakeman, Huron county, Ohio. The goods which Patrick had left in Athens, he had shipped to him at Wakeman.

The entire family, that is, Patrick, his wife and the child, James Edward Murray, remained at the home of Patrick's father in Wakeman, until the 11th of July, 1904, when Mrs. Murray died. Patrick and the child continued at the home and in the family of Patrick's parents until he—Patrick—died there on the 24th day of November, 1904; thereafter, the child remained with his paternal grandparents until the 28th or 29th day of the same month, when, with the approval and consent of his grandparents, at least with such approval and consent given by the grandmother and without objection on the part of the grandfather, said infant was brought from Wakeman by Katherine Loveland, a sister of his deceased father, to her home in Lorain county.

On the 9th of December, 1904, this aunt made application to the probate court of said last named county for appointment as guardian of said infant; said application was granted and she was appointed by said court as such guardian on said last named date.

Said infant was not the owner of any property. The only duty imposed upon the guardian by such appointment was the care and custody of his person.

On the 12th day of January, 1905, J. J. Moroney, a brother of the infant's deceased mother, made a motion in said probate court to have said guardian removed on the ground that said infant was not a resident of Lorain county at the time of such appointment, and that therefore the court was without jurisdiction to make the appointment.

Upon hearing, the court overruled said motion, whereupon said Moroney appealed to the court of common pleas. Upon trial in said last named court, said motion was sustained and said guardian was removed; the court holding that said infant was not, at the time of the appointment, a resident of said Lorain county.

By proper proceedings the case is in this court on error to the order of the court of common pleas. Some question is made by

the defendant in error, that said Moroney is entitled to no standing in court. This does not seem to be well taken. He is an uncle of the infant, and ought to be interested in his welfare.

If this was a civil action perhaps the way for him to have proceeded would have been to have made the motion in the name of the infant, the uncle appearing as his next friend; but it would seem that if the court was without jurisdiction to make the appointment, and attention was called to such want of jurisdiction by motion of one acting in good faith, and having the interest which an uncle might properly have in the welfare of the infant, the motion should be heard by the court, and if judgment should be against the party filing the motion, taxing the costs against him, his interest in the case would be sufficient to entitle him to appeal. Revised Statutes, 6407 provides that "Appeals may be taken to the court of common pleas from * * * an order removing or refusing to remove an executor, administrator, guardian or other officer appointed by the probate court."

In the case *In re Johnson*, decided by the Supreme Court of Iowa, reported in 54 N. E., page 69, one Sturges filed his petition to be appointed guardian of a female minor born to him, but who had, by legal adoption, become the daughter of Mr. and Mrs. Johnson, both of whom had died. One D. W. Diggs filed a remonstrance to the making of the appointment, setting up that he was, by will of the adopting father, Johnson, made testamentary guardian of the person and property of the minor; that said will had been duly probated, and that he was acting as guardian of the child and then had her at his home. A motion was made to strike this remonstrance from the files; this motion was sustained, and said Sturges was appointed; from this order Diggs appealed; Sturges moved to dismiss the appeal and the court says in reference to said last named motion:

"Appellant moves to dismiss the appeal upon the grounds that appellee, Diggs, is not a party to the proceedings; is not interested therein; that no judgment has been entered against him, nor that affects any substantial right of his, in such manner as to entitle him to appeal. It requires no citations to show that in the appointment of guardians the controlling consideration is the welfare of the ward. It is a special proceeding to make an appointment to which no person has a private right."

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And the court held that Diggs had a right to be heard, and overruled the motion to dismiss the appeal. Certainly the proceeding to remove a guardian is equally a special proceeding with that of making the appointment. This proceeding was instituted by a near relative of the infant. It challenged the jurisdiction of the court in making the appointment, and it was proper that this motion should be heard and determined by that court, and it seems clear that the party defeated was entitled to appeal to the common pleas court.

The question then remains whether the court erred in holding that said infant was not a resident of Lorain county at the time the appointment was made, as the word "resident" is used in Section 6254, Revised Statutes.

After a careful examination of the question the conclusion is reached that there was no error in the judgment of the court of common pleas. The carefully prepared opinion of Judge Washburn in this case, published in 4 N. P.—N. S., 233, expresses our views of the law in the case, and is so exhaustive as to render it unnecessary to discuss to any considerable extent the questions there discussed.

This conclusion, on the part of two members of the court, is at variance with their views when the consideration of this case was first taken up. We have the feeling expressed by the judge of the common pleas, that it is unfortunate that this guardian should have to be removed, but the law seems to require it. And since as both this court and the court of common pleas hold that the residence of this child is in Huron county, the probate court of that county can, and doubtless will, upon proper application being made, appoint a suitable guardian for the child, whether it be the one appointed here or some other person; but from the evidence in the case, it seems altogether probable that the Probate Court of Huron County will appoint, on proper application, the same guardian that was appointed in this county.

The order of the common pleas is affirmed.

G. A. Resck, Clayton Chapman and P. H. Moroney, for plaintiff.

E. G. & H. C. Johnson and Lee Stroup, for defendant.

VALUATION OF LOTS IN A NEW SUBDIVISION.

[Circuit Court of Hamilton County.]

FRANCIS C. DAVIS ET AL V. THE COMMISSIONERS OF HAMILTON
COUNTY, OHIO.

Decided, June 11, 1904.

*Taxation—Application for Refunder—Authority of Assessor—In Fixing
Tax Value of Lots in a New Subdivision—Errors, Fundamental and
Clerical—Remedy of Property Owner—Sections 1038 and 2797.*

1. The amendment to Section 2797, relating to plats of new towns or subdivisions presented to the county auditor for assessment, does not deprive the assessor of authority to assess and return the true valuation of each lot of a newly platted subdivision, but merely prescribes the rule which govern him in making such valuation.
2. Where it appears that the assessor acted within the scope of his authority in making his return as to the lots in such a subdivision, but did not equalize his valuations with those of adjacent lots and lands as made by the last decennial appraisement, the error is fundamental and not clerical, and the appeal of the property owner for redress should be to the annual board of city equalization.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The original application was made to the county commissioners for a refunder of taxes, under Section 1038, Revised Statutes.

In the year 1890, the plaintiffs in error were the owners of a tract of land comprising about three acres, which was valued under the decennial appraisement, at \$4,480. In November, 1891, it was subdivided into thirty-nine lots, which the annual assessor returned at a valuation aggregating the sum of \$24,200. It appearing afterwards that the assessor had, by mistake, returned a valuation price as great as intended, it was thereupon reduced to \$12,100.

The claim made before the commissioners was that under Section 2797, Revised Statutes, the assessor was authorized only to apportion the decennial valuation to the several lots into which the land had been sub-divided. The claim was rejected by the commissioners, and upon appeal to the common pleas court,

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a like judgment was rendered, together with separate findings of fact and conclusions of law. If the contention of counsel that the assessor has no authority to return the valuation upon the lots in excess of the decennial valuation upon the land be true, then the return would undoubtedly be such as the auditor may correct, or call the attention of the commissioners to. Section 2797 provides as follows:

“Whenever any person, or persons, shall lay out any town or any addition to any town, he or they shall, before the plat thereof is recorded, present the same to the county auditor, who shall cause the assessor of the proper locality to assess and return the true valuation of each lot or parcel of land described in such plat, in the same manner as new structures are valued; and thereupon such loss or parcels shall be entered on the tax list in lieu of the land included therein; but in making such valuation, regard shall be had to the next preceding decennial valuation of real estate, so that the said lots shall, as near as practicable, be equalized with adjacent lands and lots according to such decennial valuation.”

This provision was first enacted April 6, 1866, “to provide for the valuation of lands in new town plats or additions thereto,” and was construed in the case of *Mitchell & Watson v. The Treasurer of Franklin County*, 25 O. S., page 143. The second proposition of the syllabus is as follows:

“This act should be considered and construed in connection with other statutes, *in pari materia*; and when so considered and construed, its operation does not conflict with the provisions of the second section of the twelfth article of the Constitution.”

And at page 158, the court say:

“If inequality, however, does, in fact, exist—if the plaintiff’s property is placed on the duplicate for taxation at a higher valuation than other city property of the same cash value, or higher than its true value in money, ample provision is made by statute for their relief. It is their right and privilege to complain to the annual city board of equalization for redress, and it is the duty of the board to grant them relief. Until, therefore, they exhaust the remedy thus provided by statute, a court of equity should not interfere, in their behalf, by enjoining the collection of the tax.”

This case clearly recognizes the authority of the annual assessor to return the valuation of a new subdivision in an amount greater than the decennial value of the land. But counsel urged, that in order to overcome the effect of this decision, the act was so amended, by the revision of the statutes, as to provide that in making such valuation, regard shall be had to the next preceding decennial valuation of real estate, so that the city lots shall, as nearly as practicable, be equalized with adjacent lands and lots according to such decennial valuation. Such revision, however, does not change the power or authority of the assessor to assess and return the true valuation of each lot, but merely prescribes the rule which shall govern the assessor in the making of such valuation. If it were intended that the assessor should only apportion the valuation of the land to the several lots into which the tract has been subdivided, there would be no occasion to provide for the assessing and returning of a true valuation, prescribing any rule whereby it should be done. The provision that the assessor shall assess and return the true valuation of each lot, shows that he is to exercise his judgment in arriving at such valuation, and to aid him in arriving at a correct conclusion, as well as equalize said lots with adjacent lands and lots, he is directed to have regard to the next preceding decennial valuation of real estate. The findings of fact show that the valuation of these lots were not equalized with adjacent lands and lots, but the assessor was acting within the scope of his authority, and the error was fundamental and not clerical. The plaintiffs in error were not without remedy, but could have appealed to the annual city board of equalization for redress.

Judgment affirmed.

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Hamilton County.

UNREASONABLE LICENSE FEES.

[Circuit Court of Hamilton County.]

JOHN C. UHRLAUB V. THE CITY OF CINCINNATI ET AL.*

Decided, June 12, 1903.

Restraint of Trade—By Imposition of Unreasonable License Fee—Ordinance Requiring Fee from Transient Dealers—Injunction.

An ordinance which imposes a license fee of \$300 on temporary stores and transient dealers is invalid, because prohibitive as to some classes, unreasonable as to others, and in restraint of trade.

It is agreed by counsel for the city and counsel for the plaintiff that the following additional facts are admitted to be true, and are to be taken as a part of the record in this case, to-wit:

1st. That the plaintiff in this case was a temporary and transient dealer within the meaning of the statute and ordinance in question in this case, and further, that the plaintiff brought his stock of goods from New York to the city of Cincinnati for the express purpose of opening a temporary store for the sale of the same in the city of Cincinnati, and that he did open said store for the aforesaid purpose.

2d. It is further admitted that the auctioneer engaged by the plaintiff to sell at auction the goods of the plaintiff in the store opened by the plaintiff, had paid the license fee, and had obtained a license from the city of Cincinnati to act as auctioneer, and that the city of Cincinnati required the plaintiff to take out a further license for the privilege of opening a "temporary store."

3d. That the goods which are described in the petition of the plaintiff, and which were offered for sale by the plaintiff, as described in the petition, were not in the original packages in which they had been brought from New York to the city of Cincinnati, but that said original packages were broken, and the articles contained in said original packages were taken therefrom, and offered for sale separately.

*Affirmed by the Supreme Court without report, May 31, 1905.

Brief of Kramer & Kramer for the plaintiff.

Our contentions are, as follows:

First. The ordinance, *on its face*, unjustly discriminates between men in the same business, *i. e.*, for illustration, from the seller of rugs a license fee is exacted, while the seller of agricultural articles in a transient store, goes scot free. The seller of boots and shoes is taxed \$300, while he who sells the same articles (using his temporary store to exhibit the samples) is exempt.

Judge Spear said, in *State v. Gardiner*, 58 O. S., page 610:

“Our Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens, from which others of the same class are exempt. A statute, therefore, which imposes special restrictions or burdens, or grants special privileges under the same circumstances can not be sustained, because it is in contravention of the equal rights guaranteed by the Constitution. The constitutional objection to this statute is that it operates unequally. It imposes the burden of examination and license fee upon certain persons, and exempts others of the same class pursuing the same business in the same way.” See, also, *Sipe v. Murphy*, 49 O. S., 536.

Second. Our adversaries seek to sustain this ordinance on the plea that it is a valid exercise of the police power. Many ordinances are sustained under this great blanket power and many hardships have been wrought by a misapplication of the same. It will be noted, however, that the exercise of this power must be reasonable and undiscriminating. If, in the exercise of that power, partiality is evident, or if it savors of class legislation, such exercise is invalid and reprehensible, as is attested literally by thousands of decisions.

We can not do better than quote Volume 22 of the A. & E. Enc. of L., p. 938:

“In order that a statute or ordinance may be sustained as an exercise of police power, the courts must be able to see (1), that the enactment has for its object the prevention of some offense of manifest evil or the preservation of the public health, safety, morals, or general welfare; and (2), that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions

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thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The police power can not be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes."

Many authorities are referred to in support of this text; but it is needless to elaborate upon them here. We quote a few as follows: 108 Cal., 326; 16 Pick. (Mass.), 126; 80 Minn., 58; 109 N. Y., 389; 8 C. C., 665.

Third. The court will scrutinize this exercise of the police power with care, for it is the exercise of a purely delegated power by a municipality. Unless such exercise is carefully supervised any constitutional property right may be invaded under the guise of city ordinance, claimed to be passed in the exercise of the police power.

Fourth. The pretended evils of transient stores can be conjured up only by a fanciful imagination. It is because of these imaginary evils that it is attempted to deprive the public of a species of healthy competition.

Moreover the ordinance itself is indefinite. It does not define a transient dealer.

Fifth. Therefore it is conceded by counsel for the city that the ordinance applies to any person or company which has a regular established business in the city, and opens temporarily another or other places in the city for the temporary sale of its goods in other localities. Therefore, if John Shillito & Co. should open temporarily another store for the sale of some of its goods, they would have to pay this license fee or tax of \$300. If such would occur, it seems there could be no question but what John Shillito & Co. would in a similar suit as this be relieved on the ground of unreasonableness and discrimination; for while they would be so required, the other houses who would not so temporarily open stores or other places would not be the subject of such an imposition. Who can say if a person opens a store, or other place in a city when he begins business, does not intend to permanently carry it on. He may possibly

intend to remain a short time, a few days, but finds the business justifies a permanent continuance, yet he must pay his \$300 before he concludes what he will eventually do; so that under this ordinance the authorities determine in advance whether the party is going to remain a short or long time. The ordinance is therefore arbitrary and unreasonable.

Sixth. The ordinance is unreasonable and in restraint of trade, as it purports to charge a party nothing if he stays a long while, and a heavy tax if he remains a short time. If he remains a day to sell, or two or three days, he must still pay his \$300. It is therefore also in restraint of trade and void for that reason, for it deprives the community of the benefit of competition.

Seventh. The act under which this authority is assumed is unconstitutional, for it is in violation of Section 8, Article I, and Section 2, Article IV of the Federal Constitution, and in conflict with Section 2 of Article XII of the Constitution of Ohio.

It seems to us that some sinister influence and purpose was behind this ordinance and ordinances of this character, and the court should put the seal of condemnation upon them.

GIFFEN, P. J.; SWING, J., concurs.

The ordinance involved in this case is unreasonable, unjust and practically prohibitive in fixing the fee for maintaining a temporary store at the sum of \$300, regardless of the amount of goods offered for sale, and of the length of time the business is to be carried on. If the value of the goods is \$300 or less, the collection of the prescribed license fee in effect confiscates the goods, and, if the licensee wishes to operate a store for one day only he is charged the same fee as one who desires to maintain it for the period of a week, a month, or a year.

The amount of goods on hand, and the success of the venture are both important factors in determining the length of time that the store would be kept open. A ready sale of all the goods might terminate the enterprise, or on the other hand, induce the proprietor to purchase other goods and continue it indefinitely. A merchant could rarely afford to pay the

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sum of \$300 for the privilege of opening a temporary store, and hence this provision of the ordinance operates in restraint of trade. For these reasons we hold the ordinance to be invalid, and reverse the judgment of the common pleas court.

Kramer & Kramer, for plaintiff.

Albert H. Morrill, contra.

**DANGER TO CHILDREN FROM MAINTENANCE OF A
BODY OF WATER.**

[Circuit Court of Summit County.]

THE AKRON WATER WORKS COMPANY V. HIRAM S. SWARTZ.

Decided, October 12, 1906.

Bills of Exceptions—Irregularities in Preparation of—Not Jurisdictional, When—Negligence—Child Drowned in a Reservoir—Mere Existence of a Body of Water—Not Within the Rule of the Torpedo Cases—Trespassers and Licensees—Error Proceedings.

1. In an error proceeding the adverse party is entitled to ten full days for the filing of objections to the bill of exceptions, and the transmission of the bill and the receiving of by the trial judge on the tenth day after notice of its filing is premature; but where this abridgment of the rights of the defendant in error is a matter for which the clerk of court is responsible, and for which the plaintiff in error is in no way chargeable, and it is not shown that the bill was open to any objection or amendment, such an irregularity in the intermediate steps is not jurisdictional.
2. The proprietor of a body of water so situated as to present no circumstances specially enticing or hazardous to children, whereby they are led by their infantile instincts to incur the danger of drowning, is under no higher duty to infant trespassers or licensees than to adults.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the Court of Common Pleas of Summit County.

This was an action for death by wrongful act, begun August 1, 1903, by Hiram S. Swartz as administrator of the estate of Claribel Georgia Bush, a child of nine years, who was drowned May 23, 1903, in a reservoir of the Akron Water Works Company, in the outskirts of the city of Akron. The plaintiff below recov-

ered a verdict of \$1,100, December 12, 1905, whereon judgment was rendered January 8, 1906. The defendant below filed its bill of exceptions February 16, 1906, and notice thereof was mailed to plaintiff's attorneys upon the same day. No objections or amendments thereto were filed, and the bill was transmitted to the trial judge on Monday, February 26, 1906. It was signed and returned to the clerk on the second day thereafter. The record of the case is before us for review upon petition in error. The defendant in error has, however, interposed a motion to strike the bill of exceptions from the files upon the ground that it was prematurely transmitted to the trial judge, and that the full time allowed by law for filing objections and amendments was, therefore, not afforded.

Section 5301, Revised Statutes, provides that such objections or amendments shall be filed "within ten days after" the notice of the filing of the bill, and that the time for transmitting the bill to the trial judge begins to run "on the expiration" of said period of ten days.

Section 4951 provides that "unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last; and if the last be Sunday it shall be excluded."

It is clearly apparent, from these provisions of law, that where, as in this case, notice of the filing of a bill is given on the 16th day of the month, the adverse party, being entitled to ten full days within which to file objections or amendments, should have the entire 26th day of the month, unless it be Sunday, available to him for that purpose. And since the bill in this case was transmitted to and received by the trial judge on that day, it is manifest that the right of defendant in error in that behalf was invaded by the clerk in thus abridging his time by one day. It should be noted, however, first, that the plaintiff in error is not in any way chargeable with this mistake, for the statute makes it the duty of the clerk alone to attend to the transmission of the bill, and the plaintiff in error is under no duty to instruct the clerk or to anticipate that he will act prematurely in this behalf. Secondly, it is not shown or suggested that the bill is in fact open to any objection or amendment.

In *Davies v. The New Castle & Lowell Railway Company*, 71 O. S., 325, it is held that, where a party taking a bill of exceptions has seasonably filed the same "he has performed all the duties imposed upon him by the statute." And in the opinion of the court by Price, J., it is said at page 334:

"Under our former statutes, several things were required of the excepting party in order to obtain a review of his case. Some of these were held in former decisions of this court to be mandatory and jurisdictional, and if not complied with the bill could not be considered. We hope that day is now past."

The present statute differs in no material particular from the one then under consideration, and we think the rule now is that, where the excepting party is not in fault, and the bill is, in fact, properly and seasonably signed, absolute regularity with respect to intermediate steps is not jurisdictional. If the adverse party, in good faith and within the time allowed him by law, applies in vain for an opportunity to examine the bill, or to file objections or amendments thereto, we apprehend that the law will not permit him to be prejudiced if he takes appropriate measures to manifest and secure his rights.

The motion of defendant in error to strike the bill of exceptions from the files will therefore be overruled.

On the merits of the case, the facts are substantially as follows: The reservoir into which the child fell was an artificial body of water surrounded by an embankment, with steep sides sloping towards the water, and enclosed by a picket fence. There was a footpath along the embankment inside the fence, and a private driveway led from the highway to and around the reservoir. The place was not adjacent to any public road or habitation, but was somewhat frequented by pleasure seekers, including children, without any protest on the part of the water works company, though the facts imply some notice to it of the practice, as well as of the circumstance that two pickets were missing from the fence at a point where children might, if they chose, crawl through the hole thus left and enter the enclosure. The decedent, who lived some distance away, was given permission by her mother, on the afternoon of the accident, to go into the woods in that vicinity with two companions to play.

Neither the mother nor any of the children knew of the existence of the reservoir at that time, so far as appears. The children, wandering about, discovered the reservoir, crawled through the hole in the fence and were playing on the embankment when the decedent fell into the water and was drowned. No one else was present while the children were there. There was nothing about the reservoir to make it more attractive to children than other natural or artificial bodies of water usually are. The fundamental question in the case is, therefore, whether these facts constitute the negligent maintenance of an object alluring and dangerous to children. We think there can not be any question of contributory negligence left in the case after the verdict of the jury. Furthermore, although there is some conflict of authority on this point, we find the decided weight of authority to be that the mere existence of a body of water, natural or artificial, does not amount to a dangerous allurement to children so as to bring it within the rule of the torpedo cases, in this state, or the turn-table cases, in other states. Unless there are, besides the presence of the water itself, other circumstances especially enticing and hazardous to children, whereby they are led by their infantile instincts to incur the danger of drowning, the proprietor of a body of water is under no higher duty to infant trespassers or licensees than to adults. *Dobbins v. M., K. & T. Ry. Co.*, 38 L. R. A., 573; *Grindley v. McKechney*, 40 N. E., 764; *Peters v. Bowman*, 115 Calif., 365 (47 Pac., 113); *Omaha v. Bowman*, 40 L. R. A., 531; *Moran v. Pullman Palace Car Co.*, 33 L. R. A., 755; *Klix v. Nieman*, 63 Wis., 271 (32 N. W., 223); *Richards v. Connell*, 63 N. W., 915.

Many other authorities directly in point on the facts might also be cited.

The judgment must be reversed for error in refusing to grant the motion of defendant below that a verdict in its favor be directed. And proceeding to render the judgment which the court of common pleas should have rendered upon the conceded facts of the case, we here enter judgment for plaintiff in error.

Allen, Waters & Andress, for plaintiff in error.

Musser, Kohler & Mottinger, for defendant in error.

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Columbiana County.

FEES OF PROBATE JUDGES.

[Circuit Court of Columbiana County.]

THE STATE OF OHIO, EX REL JAMES A. MARTIN, v. J. FRANK
ADAMS, AS AUDITOR OF COLUMBIANA COUNTY, OHIO.

Decided, March, 1906.

*Construction of Section 546—Statute Wrongly Punctuated—Courts may
Disregard Mistake in Punctuation—Certificate of Medical Wit-
nesses—Fees for, under Section 705.*

1. Under Section 546 of the Revised Statutes, probate judges are entitled to receive six cents for each one hundred words of orders entered on the journal.
2. Under the same section they are not entitled to thirty-five cents for each certificate under the seal of the court to the copies of the certificate of the medical witness and of his findings in the case as required by Section 705.

COOK, J.; LAUBIE, J., concurs; BURROWS, J., dissents from first paragraph of syllabus.

Error to Columbiana Common Pleas Court.

Plaintiff in error is the probate judge of this county and he brought a suit in mandamus to compel the auditor to allow two claims for fees which the inspector had instructed the auditor to reject and in accordance with which instruction the auditor did reject.

The common pleas court sustained a demurrer to the petition.

The first claim was for entering orders upon his journal in inquests of insanity.

Section 546 of the Revised Statutes provides for the fees of probate judges in counties having twenty-two thousand five hundred inhabitants or more, and for services of this character the language is: "Entering order on journal, six cents; each one hundred words," etc.

The claim of plaintiff is that he is entitled to six cents for each one hundred words contained in the order entered upon the journal, while the claim of defendant in error is that he is only entitled to six cents for entering the entire order independent of

its length. We are of the opinion that the plaintiff is right in his contention.

Defendant relies principally upon the punctuation of the statute to support his claim. It will be observed that the services performed are first mentioned, then the fee he is entitled to receive. For instance: "Issuing a subpoena where there is but one witness named, eight cents, and for each additional name, three cents; entering attendance of each witness, five cents; indexing each cause, eight cents; entering judgment on journal, eight cents; recording general verdict, eight cents; entering order on journal, six cents; each one hundred words, for transcribing judgment or order on the docket, eight cents." Clearly the semi-colon is in the wrong place; likewise the comma. The semi-colon should have been placed after "each one hundred words" and the comma after "six cents."

It is true the same punctuation has been carried through the various revisions of the statutes for many years. That is unimportant, as it could easily arise from a clerical error. That the punctuation is wrong in this section is made clear when we turn to Section 1260, providing for the fees of clerks of court, which are of the same character: "For entering an order, verdict, rule or judgment on the journal, eight cents for each one hundred words."

"Punctuating ought never to vary the true sense or the general object, and the courts can disregard or repudiate it."

The other claim which was rejected by the auditor was for fees for certificates attached to copies of his findings, and also attached to the certificate of the medical witnesses.

Section 546, to which we have referred, provides that he shall receive for "each certificate, to which the seal of the court is required, and not herein provided for, thirty-five cents." It further provides: "Making out copies of records of any proceedings in a cause, when required by either party or the law, with seal annexed, eight cents for each one hundred words."

Section 705 provides:

"The probate judge, upon receiving the certificate of the medical witness, made out according to the provisions of the

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preceding section, shall forthwith apply to the superintendent of the asylum for the insane, situated in the district in which such patient resides; he shall, at the same time, transmit copies under his official seal of the certificate of the medical witness, and of his findings in the case; upon receiving the application and certificate, the superintendent shall immediately advise the probate judge whether the patient can be received, and if so, at what time."

Section 714 provides:

"In all cases of inquests held under the provisions of this chapter, the probate judge shall file and preserve all papers left with him, and shall make such entries upon his docket as will, together with the papers so filed, preserve a perfect record of each case tried by him."

From these provisions it would seem that the certificate of the medical witness and his findings are part of the record in the proceeding and, as payment is provided for the same under Section 546 at eight cents for each one hundred words, he is not entitled to be paid for the certificates in addition to the eight cents for each one hundred words.

Judgment of common pleas court is reversed and cause remanded for further proceedings.

Billingsley, Clark & DeFord, for plaintiff in error.

C. S. Speaker, for defendant in error.

WRONGFUL DEATH OF A CHILD.

[Circuit Court of Hamilton County.]

THE CINCINNATI TRACTION COMPANY V. JACOB SIMON,
ADMINISTRATOR.

Decided, January 18, 1906.

Negligence—Child Struck by Street Car—Charge of Court—Responsibility of Motorman Inaccurately Defined.

In a suit for damages on account of the wrongful death of a child who ran from the sidewalk in front of a street car, it is error to charge the jury without qualification that, "if you find from all the evidence that the motorman who had charge of the car which

struck the plaintiff could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car plaintiff was knocked down and injured. It would be such negligence on the part of the defendant as would enable the plaintiff to recover."

SWING, J.; JELKE, P. J., and GIFFEN, J., concur.

This was an action in the court of common pleas for damages for the death of Isadore Simon, a child four and a half years, who was run over and killed by one of plaintiff in error's cars. A verdict and judgment was rendered in said court in favor of the plaintiff for the sum of \$2,000.

Numerous errors were assigned in this court for the reversal of said judgment. It is urged that the court erred in its charge to the jury. The charge of the court contained this instruction:

"The court says to you if you find from all the evidence that the motorman who had charge of the car which struck the plaintiff could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car plaintiff was knocked down and injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover."

This portion of the charge is certainly inaccurate and misleading on a very vital question in the case. In the first place, the court says that if "the motorman could have seen *plaintiff*, * * * and that by reason of the failure to stop the car, *plaintiff* was knocked down and injured." The plaintiff in this action, Jacob Simon, administrator, was not knocked down and injured, but the child, Isadore Simon, was knocked down and injured, and it is on account of his death that Jacob Simon, administrator, prosecutes the action. It is probable that the court did not mean the *plaintiff* Jacob Simon, but did mean Isadore Simon, the child, and it may be that the jury understood that when the court used the word *plaintiff* it did not mean the plaintiff in this action, but did mean Isadore Simon, the child, who was injured, and probably these misstatements, standing alone, should not be considered by a reviewing court as necessarily prejudicial, although erroneous. But it seems to us that there is prejudicial error in this portion of the charge, where the court says:

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“That the motorman who had charge of the car which struck the plaintiff, could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car, plaintiff was knocked down and injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover.”

When did it become the duty of the motorman to see the child, or if having seen it, when did it become his duty to stop his car? On these important matters the court does not instruct the jury, but does say without any qualifications, that if the motorman could have seen the “plaintiff” and stopped the car.

There was absolutely nothing, as far as the evidence shows, to prevent the motorman from seeing the boy while he was standing on the sidewalk, and there was nothing to prevent the motorman from stopping his car before ever the boy left the sidewalk. This statement is too broad; it is not accurate, and is calculated to be misleading. It may be that the court did not intend that it be taken in that sense, but it might very well be. It is not the duty of the motorman to stop his car so as to avoid injury to persons who may come in contact with it unless as a man of ordinary prudence has reason to, or should have reason to believe that his failure to stop the car would cause injury.

In this case, it was not the duty of the motorman to stop his car, unless as a man of ordinary care and prudence he had reason to, or should have had reason to apprehend that his failure to do so would cause injury to the child. Necessarily no duty rested on the motorman as to this child until it indicated by its movements that it was about to cross the track; but the court says if the motorman could have seen the “plaintiff” and stopped the car, and that by the failure to stop the car the “plaintiff” was injured, it was negligence. It is evident, we think, that this is not the negligence for which a recovery can be had, and standing without any qualification, was erroneous, and for this reason the judgment is reversed and cause remanded for a new trial.

Geo. H. Warrington, for plaintiff in error.

Theo. Horstman and Geo. H. Kattenhorn, contra.

SOLICITATION OF BRIBE BY COUNCILMAN.

[Circuit Court of Summit County.]

JEREMIAH AMUNDSON V. THE STATE OF OHIO.

Decided, April 17, 1906.

Bribery—Section 6900, Applicable to Councilmen—Evidence Establishing a Case for the Jury—Defendant's Meaning by Certain Remarks—Words and Phrases—Criminal Law.

1. The words "or other officer," as used in Section 6900 and having relation to the giving of bribes to public officers or agents, includes members of a city council.
2. Testimony to the effect that the defendant, a member of the city council, had said with reference to a proposed street improvement, that "some of the other members of council will have to be fixed up," and that it will take \$1,400 to get the matter through, is sufficient to make a *prima facie* case of soliciting a bribe and to carry the case to the jury; and as to what the defendant meant by the words "taking care of other councilmen" was a question for the jury.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the Court of Common Pleas of Summit County.

Plaintiff in error was convicted of soliciting a bribe in October, 1905, to influence his official action as a member of the council of the city of Akron in the matter of the North Arlington Street improvement, then pending before that body. The indictment was drawn under favor of Section 6900, Revised Statutes, which provides that—

"Whoever, being a member of the Legislature, or a state or other officer, or public trustee, or agent or employe of the state, or of such officer or trustee, either before or after his election, qualification, appointment or employment, solicits or accepts any such valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in any matter pending, or that might legally come before him, shall be imprisoned in the penitentiary not more than five years, or fined not more than five hundred dollars, or both,"

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The first assignment of error involves the application of this section to the members of a city council. It is contended that the words "other officer" in the statute, in connection with the references to the "state" or "public" service therein contained, can not be deemed to include mere local officials such as the officers of a municipal corporation. We do not agree with this contention. There is no other provision in the statutes covering cases of this particular character, and it is unreasonable to suppose that the General Assembly, by thus discriminating, has left wide open the door of municipal corruption. True, the statutes contain separate provisions covering the giving or accepting of bribes, or the promise thereof, in the case of jurors, jury commissioners, referees, county seat commissioners, etc.; but the very large and vitally important classes of officials who administer our county, city and village governments seem to be made subject to no other provision of law in this behalf than the section under which this indictment was drawn.

The second assignment of error relates to the sufficiency of the state's evidence to make a *prima facie* case. The main witness for the state, Arthur J. Rowley, of counsel for persons interested in the improvement, testified that the accused, in conversation with him in the fore part of October, represented that he was in favor of said improvement and wanted nothing for himself but the political friendship of the persons interested, but that "so far as some of the others were concerned they would have to be taken care of." And the next day the accused told him further: "I talked that matter over and it will take \$1,400."

Frank W. Rockwell, another witness for the state, testified to a conversation which he had with the accused about the same time. He had understood from Amundson, who was chairman of the council committee having the matter in charge, that the pending ordinance would be brought up for passage at the next meeting; but just before the meeting convened he told Rockwell that "he didn't want to bring it up." The witness asked him "Why?" and he replied that the proposition to the city by the corporation interested in the improvement was unsigned. The witness thereupon reminded him that the proposition referred

to had been signed and submitted in June, and should be in possession of the street committee. Amundson then remarked: "Well, there are interests of some of the other members of the council that will have to be fixed up." The witness inquired what interests they had in it, to which the accused answered, "Well, I will bring it up."

We think the testimony of the witnesses Rowley and Rockwell taken together was sufficient to carry the case to the jury as tending to prove that he was soliciting from the corporation above mentioned through the above named witnesses the payment of \$1,400, to him for other members of the council, as a condition of his own official action in favor of said improvement. And this is the gist of the offense for which he was indicted and of which he was convicted.

It is claimed, however, that there is such confusion and discrepancy of dates and circumstances in the testimony above quoted and the records of council proceedings as to render it insufficient for a *prima facie* case. Without entering into a discussion of the question, we are content to say that our examination of the record fails to sustain this claim.

It is said further that Amundson's explanations of his conversations with Rowley afford the only reasonable interpretation thereof, viz., the \$1,400 was his estimate of the damages for which the city would become liable to adjacent property owners by reason of the improvement, and which he believed Rowley's client should agree to pay to the city, and that the taking care of other councilmen meant that they should be acquainted by those interested with the facts which rendered the improvement desirable and advantageous to the city. This was properly a question for the jury, and we see no reason for disturbing their verdict in view of all the evidence.

There being no error in the record, the judgment is affirmed.
Stuart & Stuart, E. F. Voris. for plaintiff in error.

H. M. Hagelbarger, Prosecuting Attorney, and *Chas. R. Grant,* for defendant in error.

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CONSIDERATION FOR DISMISSAL OF A SUIT FOR DAMAGES.

[Circuit Court of Allen County.]

LAKE SHORE & WESTERN RAILWAY COMPANY v. WILLIAM TIERNEY.*

Decided, 1905.

Breach of Contract—For Future Employment—Consideration, the Dismissal of a Suit for Damages—Measure of Damages for Breach—Justification for Discharge—Good Faith in Believing Services were Unsatisfactory.

1. The dismissal of a suit for damages, brought by an injured employe of a railroad company, is a sufficient consideration for a contract for his future employment so long as his services are satisfactory.
2. Dissatisfaction with such services, such as to justify a discharge, must be a reasonable dissatisfaction and not an arbitrary one.
3. The good faith of the company in claiming such services to be unsatisfactory will not alone justify the discharge, if the services rendered were, in fact, such as ought to have been satisfactory to a reasonable employer.
4. The measure of damages for the breach of such contract for employment is the amount of money which the employe would have earned at the stipulated salary from the time of his discharge to the time of the trial, together with the amount he could in future earn in the time during which he could reasonably be expected to serve, taking into account his age and state of health, and deducting whatever amounts he could reasonably have earned at other employment since his discharge, and what he might so earn in the future by reasonable diligence.

HURIN, J.; NORRIS, J., and VOLLRATH, J., concur.

William Tierney, an employe of the L. E. & W. R. R. Co., some years ago sustained an injury through the alleged negligence of the railroad company, which resulted in the loss of a leg. He brought suit against the railroad company for thirty thousand dollars damages. That case was compromised and the suit dismissed, Tierney at that time signing a written instrument whereby, for a nominal consideration of one dollar, he released and discharged the railroad company from all claims, demands,

*Affirmed by the Supreme Court without report, October 2, 1906.

suits, actions and causes of action, etc., for any injuries to his person. The instrument contained this clause: "Said company to employ me so long as my services are satisfactory."

This agreement was dated October 31st, 1892. In pursuance of the agreement Tierney was employed by the railroad company as an assistant in the freight office at a salary of forty or forty-five dollars per month. This employment continued nearly a year. He was then transferred to the South Main street crossing in Lima as flagman at twenty-five (\$25.00) per month. He accepted this employment and continued to serve as flagman at that point until October 27th, 1899, when he was discharged for alleged misconduct, including negligence, absence from his post and drunkenness.

He thereupon commenced this action against the railroad company alleging that his discharge was without cause; that the company had refused and still refused to furnish him employment; that he had in all respects fulfilled his agreement with the railroad company, to-wit: the dismissal of the action for damages previously referred to, and that his services rendered the company were of a nature that should have been satisfactory to the defendant. For this breach of its contract of employment he asks damages against said company in the sum of ten thousand dollars.

The company answered admitting the dismissal of the former suit by Tierney; the contract of employment, the employment of Tierney in accordance with that contract, and his subsequent dismissal; and avers that his services were not satisfactory to defendant and that he was for that reason discharged. The case has been twice tried and the jury at the second trial returned a verdict in favor of the plaintiff for three thousand dollars. Judgment was entered on the verdict, a new trial being refused.

This judgment we are now asked to reverse. The case seems to have been fairly tried and we have discovered no prejudicial errors in the admission or rejection of evidence. But strenuous objection is made to the verdict as against the weight of the evidence, and to the charge of the court to the jury; and especially to the refusal of the court to charge the jury as requested.

It is claimed, and the court was asked to charge, that the contract furnishes no practical basis on which the amount of dam-

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ages can be ascertained—that it is therefore void for uncertainty and want of mutuality.

That it is a difficult problem to determine the exact amount of damages recoverable in such a case must be admitted. The uncertainty of life, of health, of continuing ability and disposition to render satisfactory services, combine to make a computation difficult. But the contract does furnish a basis for the computation and a practical one. That basis was well defined by the trial judge in his charge to the jury as full compensation in dollars and cents for all injuries arising from the breach of the contract. The details of the problem will be referred to later, but this is the basis of the computation, and the defendant having made the contract, having received the consideration therefor—the dismissal of a thirty thousand dollar damage suit—can not be heard to complain that the contract is void for want of mutuality or for uncertainty, when the uncertainty consists merely in a difficulty of computation.

The court was asked to charge the jury that the company was to be the sole judge of the services rendered, and, if in good faith, it decided that his services were unsatisfactory, it had the right to discharge the plaintiff at any time.

This does not fairly state the case. The defendant may have been dissatisfied and may have thought that it had reason for dissatisfaction, and may have acted in good faith and so discharged plaintiff, and yet it may have been requiring unreasonable things; it may have been misinformed as to his conduct and so may have become dissatisfied without good cause, yet in perfect good faith. This contract should not be construed from one side alone, and the court properly refused to do so in this respect. Each party had his rights and obligations. The obligations as well as rights of each must be considered. The charge as requested did not, in our judgment, meet this test.

Decisions of courts in other states, ignoring this mutuality of obligation and right, are cited by counsel for plaintiff in error; but, where they are applicable at all, we think them not within sound reason as applied to cases such as the one at bar.

The court was also asked to charge that even though the services may have been such as should have been satisfactory up

to the time of the discharge, yet the jury is not authorized to presume that the services would have continued to be satisfactory to the defendant for any definite time.

It was in evidence that for seven years this plaintiff had rendered services sufficiently satisfactory to the defendant to secure his retention in its service. There would seem to be a strong presumption from that fact as to his continuing to do so, unless this was destroyed by evidence as to his past conduct or present want of capability. Of this evidence and of its weight the jury was the judge. It had a right to make such a presumption, if the evidence warranted it.

The court was also asked to say to the jury: "The jury can not speculate as to the probabilities of further employment on the part of Tierney."

This, we think, was properly refused, and it brings us to the consideration of the true rule for estimating the amount of recovery, if any, on the basis of injuries, received from the alleged breach of contract. In the case of *Stearns v. The L. S. & M. S. Ry. Co.*, 71 N. W. Rep., 148, this rule is stated:

"For the employer's breach of a contract of employment at a specified salary during a person's natural life or his ability to do the work, the measure of damages is the amount which the employe would have earned up to the time of trial at the contract salary, and the present worth of what he would be able to earn in the future, so long as he would be able, in the ordinary course of events to perform the service, less any sums which he would be able to earn in other employment by the exercise of reasonable diligence."

And in the case of *Pierce v. Tennessee Coal, Iron & Railroad Co.*, 173 U. S., 1, the Supreme Court lays down this rule:

"Where the railroad company after a time abandoned the contract and discharged the employe without cause, the latter may maintain an action once for all, as for a total breach of the entire contract, and may recover all he would have received in the future, as well as in the past, if the contract had been kept, deducting any sum he might have earned in the past or might earn in the future and any loss the company had sustained by loss of his services without its fault."

To the same effect is the case of *The East Tennessee Valley & G. R. Co. v. Staub*, 7 Lea (Tenn.), 397, where it is said that:

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“the difficulty of ascertaining the damages by reason of the uncertain and contingent events upon which they depend, as the duration of plaintiff’s life, is no objection to the action.”

We must conclude then that the requests to charge, complained of as not given, were properly refused; that a practical basis for damages is afforded by the contract and that the court properly instructed the jury in the charge as given.

Was the verdict justified by the facts proven, and under the charge as given? To have found as it did, the jury must have found from the evidence that plaintiff was discharged without justifying cause and that the amount of injury that he sustained by that discharge, measured by what he would have earned up to the time of the trial and by the length of time he could reasonably be expected to serve in the future, taking into account his age and state of health, and deducting what he could reasonably have earned and might earn in the future in other employment, equalled \$3,000.

There was much evidence tending to show that plaintiff’s discharge was justifiable; that he drank too freely for one on whom such grave responsibility rested; that he was careless and negligent in warning people of the approach of trains; that he frequently absented himself from his post, and that in other ways he was unfit for this position; and that, too, through his own fault. All this was denied by plaintiff’s witnesses, who testified to the contrary.

The jury had the testimony before it. It was a question of fact to be determined by the jury. We can not say that their conclusion in this regard was against the weight of the evidence.

As to the amount of the verdict, while it seems to have been a liberal amount, it is not so excessive in our judgment as to justify a reversal. It is interesting to note in this connection, that at the rate of wages which Tierney was earning at the time of his discharge, his earnings from that day to this would have amounted to just \$1,700—considerably more than half the verdict. At his time of life it seems altogether possible that he may live and retain his health long enough to have fully earned the balance of the judgment. But this merely in passing.

Finding no error, the judgment of the court of common pleas must be affirmed. Judgment against plaintiff in error for costs,

for which execution is awarded, and cause remanded for execution.

Walter B. Richie and *W. H. Leete*, for plaintiff in error.

Edwin Blank and *Cable & Parmenter*, for defendant in error.

**TITLE OF SUCCESSFUL PLAINTIFF TO FUND IN THE
HANDS OF RECEIVER.**

[Circuit Court of Hamilton County.]

ELIZABETH EICHERT, EXECUTRIX, v. ELIZABETH EICHERT,
WIDOW, ET AL.

Decided, February 18, 1905.

*Rents—Collected by a Receiver—Title to, Where the Action is Dis-
missed without Prejudice—Sale of Property to Pay Debts of a
Decedent—Distribution—Rights of Mortgagees—Not Determined by
Dismissal, When.*

Where an action to sell property to pay the debts of a decedent is dismissed without prejudice to the rights of certain defendants holding mortgages, and upon whose application a receiver has been appointed to collect rents for use in procuring insurance and redeeming the property from forfeiture for unpaid taxes, and the fund has not been so applied, the receiver does not hold the fund for the benefit of the successful party, but is bound to account therefor to the court appointing him.

GIFFEN, J.; JELKE, J., and SWING, J., concur.

This action was commenced in the court of common pleas for the purpose of selling real estate to pay the debts of the testator.

On November 21, 1900, the defendant, F. S. Starkey, was appointed receiver to take charge of all the property in the petition described, with sole power to collect rents from the various tenants and to apply the proceeds thereof under the direction of the court toward the insurance of the premises against loss by fire, and toward the redemption of said property from forfeiture for unpaid taxes.

On April 11, 1901, the action was dismissed without prejudice to the rights and claims of the Bodmann German Protestant

*Affirmed without report, 74 Ohio State, —.

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Widows' Home, Gustav Tafel, and W. T. Wagners' Sons Company on their mortgages held by them respectively.

On October 10, 1903, F. S. Starkey, as receiver, took a receipt from Elizabeth Eichert, life tenant of the premise, for the sum of \$455.73.

On October 12, 1903, the court made an order directing the receiver to turn over the money then in his hands, and collected by him as receiver, to Elizabeth Eichert. On October 31, 1903, the court found that this order was inadvertently made and thereupon set it aside.

On March 30, 1904, F. S. Starkey and J. G. Hudson were made parties defendant, and filed an answer in which they aver that on the — day of October, 1900, Elizabeth Eichert, the life tenant, in consideration of services performed and to be performed by them as attorneys, assigned and transferred to them all of the rents, amounting to \$1,200, and that after deducting the \$455.73, for which the receipt of Elizabeth Eichert had been given, there remained a balance due of \$744.27.

On March 30, 1904, the report of the receiver showing a balance of \$1,628.41 in his hands, was approved and confirmed. And the cause coming on further to be heard upon the motion of Elizabeth Eichert, to require the receiver to pay over to her the funds in his hands, and the answer of F. S. Starkey and J. G. Hudson, the court ordered the receiver to pay the sheriff of Hamilton county, Ohio, said sum of \$1,628.41, together with all rents collected since February 20, 1902, less the necessary expense and the fee to him, F. S. Starkey, of \$175, and ordered the sheriff to distribute and dispurse said moneys in accordance with the terms of any order the court may make in case No. 123678, entitled "Gustav Tafel, plaintiff, v. Eichert et al, defendants, Hamilton County Court of Common Pleas," in which case the property described in the petition had been sold by the sheriff. And thereupon the court terminated the receivership.

No money was paid by the receiver to Elizabeth Eichert when the receipt of October 10, 1903, was executed. It was simply an exchange of receipts between the receiver and Elizabeth Eichert, and was without authority from the court appointing him. The

subsequent order of October 12, 1903, was never complied with and being set aside on October 31, became a nullity.

It is claimed by the receiver that by the dismissal of the suit, the rights of the parties were finally established, and that as receiver he held the fund for the benefit of the successful party; that no order of the court was required to perfect the title of such party to the fund. He relies upon the rule stated in the 23 Am. & Eng. Encyc. of Law, page 1128, as follows:

“The functions of a receiver are, as a rule, terminated by a final decree in the cause whereupon the receiver ceases longer to act in the capacity of receiver, but becomes a trustee as to the property in his possession for the person entitled thereto under the decree. This rule applies, it has been held, though there is no formal order made discharging the receiver.”

In this case, however, no decree was entered fixing the rights of the parties, but on the contrary the case was dismissed without prejudice to the rights of the very defendants upon whose application the receiver was appointed. Among those rights was the one to have the proceeds of the rents collected by the receiver applied to the payment of their claims after the payment of taxes or other prior liens.

The receiver is an officer of the court appointing him, and subject to its direction and control. At the time of the appointment, the receiver was empowered to apply the proceeds, under the direction of the court, towards the insurance of the premises against fire, and toward the redemption of said property for forfeiture for unpaid taxes. It appears that no taxes were paid by the receiver. Under such circumstances, Elizabeth Eichert, life tenant, was entitled to no part of the fund, and the receiver was bound to account for the same to the court appointing him.

We think the order appealed from was proper and a like order will be made in this court.

F. S. Starkey and J. G. Hudson, for the appellant.

Chris. Von Seggern and Tafel & Schott, contra.

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PROPERTY HELD IN TRUST FOR A FRATERNAL ORDER.

[Circuit Court of Franklin County.]

NEW ENGLAND LODGE No. 4 F. & A. M. ET AL V. RUFUS M.
WEAVER ET AL.

Decided, 1906.

Trusts and Trustees—Conveyance for Benefit of Masonic Lodges—Rights of the Cestuis que Trustent—Seceders must Invoke Procedure within the Organization—Can not Establish Their Right to Title to Property of the Organization by an Action in Court—Duty of Public Officer Holding a Dry Trust.

1. Where a deed to a public officer in trust for certain unincorporated societies names beneficiaries and employs words of perpetuity to convey the fee, but does not invest the trustee with any other duty than that of being the mere repository of the legal title, it is competent for such trustee to execute the trust at the instance of the *cestuis que trustent* by conveying such property to them or their nominee.
2. Where a grantor conveyed land to the governor of the state, in trust for the local organization of certain fraternal orders, the fact that such local bodies have seceded from the state organization which had chartered them, will deprive them of the right to enjoy such property, where their charters have been reissued to other bodies since the secession.

HENRY, J.; MARVIN, J., and GIFFEN, J., concur (sitting in place of the Judges of the Second Circuit).

Heard on appeal from common pleas court.

This was a case involving a controversy between two organizations, each claiming to be the *cestui que trust* of land in the town of Worthington, Franklin county, Ohio, which was conveyed in 1824 by one John Snow to Jeremiah Morrow, governor of the state of Ohio, and his successors in office forever, "for the use and benefit of New England Lodge and Horeb Royal Arch Chapter, Free and Accepted Masons, established in said town of Worthington." This lodge and chapter were established respectively in 1814 and 1816 by charters from the grand lodge and grand chapter of the state of Ohio, and they were incorporated under the laws of Ohio in 1887 and 1888. In 1891 the local bodies in Worthington withdrew from their respective

state organizations aforesaid, by reason of requirements imposed by the latter upon them which they deemed to be unmasonic and a departure from the ancient landmarks of the order. The state organizations thereupon demanded a surrender of their masonic charters, and this being refused, duplicate or substitute charters were issued to a small minority of the local bodies who had either not participated or had not persisted in the revolt. The seceders remained in possession of the property in dispute, maintaining substantially their accustomed names, practices and corporate organizations, but no longer in subordination to the grand lodge and grand chapter of the state of Ohio.

In 1899, the local bodies, to which the duplicate charters had been issued, procured from Asa S. Bushnell, then governor of the state of Ohio, a deed of conveyance of the property in dispute to one Weaver, as trustee for their local lodge—their local chapter having waived its rights thereto. Thereupon the seceders, being still in possession and claiming to be the true beneficiaries of the original trust, brought this action to enjoin the record of said deed, to have the same declared null and void, and for general relief. The present governor of the state of Ohio, the recorder and auditor of Franklin county, and the grantee of Governor Bushnell are made parties defendant.

The plaintiffs contend that the sole issue to be decided here is as to the validity of the deed from Governor Bushnell to Weaver. The defendants contend that a preliminary question is, whether or not the plaintiffs are the beneficiaries of the original trust, and if not, whether they have any standing in court to complain of the alleged invalidity of said deed.

On the part of the plaintiffs it is urged that this action is properly brought within the purview of Section 5779, Revised Statutes of Ohio, which provides that, "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest." They further urge that the terms of the trust, as defined in the deed to Governor Morrow, are such as to devote the land in controversy to the uses thereby defined, in perpetuity, and that Governor Bushnell, therefore,

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had no right to alien the property to any person or for any purpose whatsoever.

Our examination of the deed to Governor Morrow and of the authorities cited to us, convinces us that the original trust was nothing else than a simple or dry trust, created to obviate the difficulty of granting the land directly to two unincorporated societies for their joint use. The deed names the beneficiaries and employs words of perpetuity to convey the fee, but it does not invest the trustee with any duty other than that of being the mere repository of the legal title. It was, therefore, perfectly competent for the trustee to execute the trust at the instance of the beneficiaries by conveying it to them or their nominee.

We are, therefore, compelled, even on the plaintiff's theory of their case, to inquire next whether the alleged beneficiaries thus recognized by Governor Bushnell were the *cestuis que trustent* of the original deed to Governor Morrow. It is clear that Snow, the original grantor, sought to name as beneficiaries the local bodies then established in Worthington in subordination to the state bodies then existing. It is equally clear that the plaintiffs have seceded from that relationship. They may have had the best of reasons for so doing, and their claims as to the action of the state bodies being a departure from the ancient landmarks may be perfectly true. But those are questions which they must work out through the organizations themselves. They were entitled to invoke the procedure afforded by those organizations for the relief of dissatisfied adherents. It is not complained that such procedure was not afforded, nor that they were denied the right to invoke it. And we must, therefore, hold that the plaintiffs, having withdrawn from the organizations contemplated by the original deed of trust, are not entitled to the relief for which they pray.

Petition dismissed.

T. J. Duncan, for the plaintiffs.

O. W. Aldrich and *Allen Andrew*, for the defendants.

PARTITION SALES.

[Circuit Court of Hamilton County.]

ALBERT W. SCHWARTZ, EXECUTOR OF THE ESTATE OF LEWIS FREEMAN, DECEASED, v. KATURAH M. WILLIAMSON ET AL.

Decided, May 21, 1904.

Purchaser's Right of Possession—Where Property has Been Sold in Partition—Dates from Confirmation—Liability for Rent During the Intervening Period—Liability of Assignee of the Lease—Effect of a Provision in Section 6600, Relating to Ejectment.

A purchaser at a sale in partition is not entitled, under Section 6600, to possession until the sale has been confirmed; and where the purchase is of a part of the title only, and confirmation is delayed, the purchaser can not be compelled to pay rent to the holders of the remainder of the title during the intervening period.

GIFFEN, J.; JELKE, J., and SWING, J., concur.

The original action was commenced to recover quarterly installments of rent from the tenant of an undivided one-sixth interest of certain leasehold premises from July 1, 1898, to January 1, 1900. The defense was that in partition proceedings between the tenants in common, of the leasehold premises, the sale was had on June 30, 1898, which was confirmed at the January Term, 1900, and a deed executed by the sheriff in pursuance thereof; that a confirmation of the sale and the deed by relation divested the defendant of all title as of the date of the sale; that having paid the rent up to the day of the sale there was no liability for rent thereafter. The defendant below was in possession, not as an original lessee, but through mean conveyances from him. Judgment was rendered in favor of the plaintiff, and the defendant prosecutes error.

The liability of the assignee of a lease is limited to the rent accruing during the continuance of his interest, and ceases with his right of possession. The question, therefore, is whether confirmation of the sale and execution of the deed by relation divested the tenant of all interest in the leasehold estate as of the date of the sale.

The general rule is that confirmation of a judicial sale relates back to the day of sale and passes title as of that day, and

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the deed executed pursuant thereto takes effect as of that day. But there would seem to be a modification of this rule by Section 6600 of the Revised Statutes, which provides that a suit in forcible entry and detainer may be brought in case of sale on partition, where any of the parties to the petition were in possession at the commencement of the suit, after such sale, so made on execution or otherwise, shall have been examined by the proper court, and the same by said court adjudged legal.

It may fairly be implied from this provision that the purchaser at the partition sale is not entitled to possession until the sale is confirmed and that the tenant is entitled to hold possession until that time. It would be manifestly unjust to the purchaser to require him to pay rent when not entitled to possession of the premises, and to relieve the tenant who was entitled to such possession. In the case of *Baltimore City v. Peat*, 93 Md., 696, relied upon by counsel for plaintiff in error, the sale was confirmed within a few days after made, while the deed was not executed until a long time thereafter. In this case the confirmation of the sale and execution of the deed were about of the same date, both being subsequent to the period for which a recovery of rent is sought. See, also, *Thomas v. Connell*, 5 Pa. St., 1; *Wood v. Lessee of Ferguson*, 7 O. S., 289 and 292.

Judgment affirmed.

A. L. Herrlinger, for plaintiff in error.

Harlan Cleveland, contra.

INJUNCTION AGAINST ONE CLAIMING BY ADVERSE TITLE.

[Circuit Court of Hamilton County.]

GEORGE W. HARDING v. LYMAN PERIN, JR., ET AL.

Decided, June 28, 1904.

Title—One in Possession Entitled to an Injunction—Against an Adverse Claimant, When—Remedy at Law—Trespass Amounting to Waste.

Where a plaintiff is in possession of property which the defendant claims by adverse title, and the defendant is threatening acts which will tend to the destruction of the estate, the prayer of the plaintiff for an injunction will be granted until such time as the defendant establishes his title by an action at law.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The plaintiff claims to be the owner and in possession of a lot of ground situated in the city of Cincinnati, on which there is a brick building and warehouse, and that the defendants threaten to take possession of the west wall thereof, remove the support of the roof, and thereby cause the entire roof to fall to the ground, all to the great and irreparable injury of the plaintiff. The defendants claim title to the premises, but admit that the plaintiff is in possession. The only question to be determined is whether the plaintiff is entitled to an injunction until the disputed question of title can be determined at law. In *High on Injunctions*, 698, it is said:

“Where the party aggrieved is in possession, he will be allowed to restrain such trespasses as would result in irreparable damage in the event of refusing the relief.”

And in the case of *Ross v. Page*, 6 O. S., 166, cited by counsel for the defendant, the same doctrine is recognized. The court say:

“Where the trespass amounts to waste, going to the destruction of the estate, and producing an injury for which pecuniary compensation can not be made, chancery may be called upon for its aid to stay the mischief by injunction.”

In *Lownds v. Bettie*, 33 L. J. Ch., 451, the distinction between the acts done by a stranger and by one claiming title is clearly set forth as follows:

“Where, therefore, the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate.”

In the case before us, the plaintiff is in possession; the defendants claim by adverse title, and the acts threatened will tend to the destruction of the estate. The defendants have a

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remedy by ejectment, and until they establish their title by an action at law, we are of the opinion that the tearing down of the building and the destruction of the estate should be enjoined.

TITLE TO PUBLIC OFFICE.

[Circuit Court of Franklin County.]

STATE OF OHIO, ON RELATION OF MARK SLATER, v. JOHN
W. JOHNSON.

Decided, September Term, 1906.

Quo Warranto—Lies on Relation of a Private Individual—Claiming a Public Office, When—Nature of Title which Must be Shown—Appointive Offices—Vacancies—De Facto and De Jure Officials—Holders—State Appointments—Failure of the Senate to Act—Section 6764.

1. Quo warranto on relation of an individual will lie where the relator claims to be entitled to the office in controversy.
2. But the relator must show a *prima facie* right to the office claimed, and such right can not be based on the fact that he is the *de facto* officer; in such a case the usurper of a state office can be ousted only in an action brought by the attorney-general.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

Heard on demurrer to petition.

This action was brought under favor of Section 6764, Revised Statutes, and is before the court on a demurrer to the petition. We conclude—

First. That the case is properly entitled. See, 50 O. S., 120; Encyc. Pl. and Pr., Vol. 17, page 433, and cases there cited.

Second. That when an action in quo warranto, on the relation of a private individual, is brought to oust the incumbent from an office to which the relator claims title, the petition must show a *prima facie* right in the relator to the office claimed. *Toney v. Harris*, 85 Ky., 453; *The People, ex rel, v. Perley*, 80 N. Y., 624; *State, ex rel Rea, v. Hay*, Wrights Reports, 96; and numerous citations in Encyclopedia of Law, Vol. 23, page 626.

Slater sets forth that he was appointed to the office of supervisor of public printing by Governor Nash, June 1, 1903, and

re-appointed by Governor Herrick, June 1, 1905; but, that the latter appointment (made in vacation) was not confirmed at the next session of the Senate, which adjourned April 2, 1906.

Averring that no other appointment (meaning no other *legal* appointment) has been made, the relator claims to be a "hold-over," and entitled to continue in possession under Section 8 of the statutes, which provides that—

"Any person holding an office of public trust shall continue therein until his successor is elected, or appointed and qualified, *unless it is otherwise provided in the Constitution or laws.*"

In the case of appointive state offices, (such as supervisor of public printing) it is "otherwise provided," as follows:

"Section 12. In case of a vacancy in any office filled by appointment of the governor, by and with the advice of the Senate, occurring by expiration of term, or otherwise, when the Senate is in session, the governor shall appoint a person to fill such vacancy, and forthwith report such appointment to the Senate; and when the Senate is not in session, and no appointment has been made and confirmed, in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the Senate; and if the Senate advise and consent to the same, the person so appointed shall hold the office for the full term; *and if the Senate do not so advise and consent, a new appointment shall be made.*"

The last clause of the foregoing section applies exactly to the circumstances of this case. The Senate did "*not so advise and consent*" to the second appointment; therefore, Slater's legal incumbency immediately ceased.

It became the duty of the then governor at once to make a new appointment. Until that was done Slater was a *de facto*, but not a *de jure* official.

If the remaining averments of the petition as to Johnson's usurpation of the office be true (as the demurrer technically admits), it is a case for action by the attorney-general, not by Slater, since he shows no right to the office in himself.

The demurrer will be sustained.

Emmitt Tompkins and James H. Allen, for plaintiff.

Lentz & Belcher and DeWitt C. Jones, for defendant.

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**TESTIMONY IN A CRIMINAL TRIAL AS TO SIMILAR
OFFENSES COMMITTED.**

[Circuit Court of Licking County.]

ROBERT C. LINGAFELTER V. THE STATE OF OHIO.*

Decided, June 19, 1906.

*Criminal Law—Trial for Forgery of a Receipt—Evidence as to Other
Similar Offenses Competent—Change of Venue—Discretion in Trial
Judge to Grant—Discretion not Abused, When.*

1. A trial judge is not without discretion in the matter of granting a change of venue in a criminal case upon the filing of affidavits that a fair trial can not be had in the county, but he must determine from the affidavits whether or not a change of venue should be granted.
2. An abuse of discretion on the part of the trial judge in overruling a motion for a change of venue is not shown, where the record discloses that but one juror was examined on his *voir dire*, and he was challenged for cause.
3. Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered or forged, and its use in connection with other instruments forged by the defendant.

TAGGART, J.; DONAHUE, J., and McCARTY, J., concur.

The case of Robert C. Lingafelter against the State of Ohio is a proceeding in error prosecuted in this court to reverse the judgment of the Common Pleas Court of Licking County, wherein Robert C. Lingafelter was convicted of forgery.

While many of the questions involved in this case were brought in review in a case of this same plaintiff in error against the State of Ohio, at Mt. Vernon, yet at the urgent request of counsel we have again examined the questions involved herein.

The plaintiff in error was indicted, tried and convicted, and now prosecutes error in this court. The first question presented

* Leave to file petition in error in the Supreme Court refused, October 2, 1906.

in the record is the refusal of the trial court to grant a change of venue. The contention of counsel for plaintiff in error is that upon the filing of a motion for a change of venue, supported by affidavits, the court is required to grant the change, and that there was no discretion lodged in the court. To quote from the brief of counsel on this question; they say:

“We claim under this statute, to-wit, Revised Statutes, 7263, that the court had no discretion about it. The statute is mandatory. It is not necessary to satisfy the court by clear and convincing proof; all that is necessary is to make it appear to the court by affidavits, and thereupon the court is required to order a change of venue.”

If this contention is correct the plaintiff in error was deprived of a substantial right, and the action of the court in this regard was erroneous. But, this section of the statute has been recently construed by the Supreme Court, in the case of *The State, ex rel Hornbeck, Prosecuting Attorney, v. Durflinger*, 73 Ohio State, 154, and in that case the court, in substance, say that the language of the statute is general, and confers this right to a change of venue alike upon the accused and upon the state. If the contention of counsel for plaintiff in error obtains, all that is necessary to be done, either by the accused or by the state, is to file a motion for a change of venue, and support it by affidavits, in which event the first one filing the motion secures a change of venue. We do not think this is the right construction to be placed upon this statute. We think the proper construction is to give to the words of the statute their controlling effect, “unless it appears to the court by affidavits that a fair trial can not be had in the county,” a change of venue can only be granted. In this view it vests in the court the duty of determining by affidavit for or against the motion whether or not such a change of venue should be made; and this vests in the court a discretion which can only be reviewed when abused. This was the holding of this court sitting in the Third Circuit, and the case was reported (Judge Voorhees delivering the opinion) in 4 C. C.—N. S., 409; and this was the holding of this court at the April Term of this year in Muskingum county. The question then arises: Did the court abuse its discretion?

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Did the affidavits in support thereof make it appear that a fair trial could not be had in this county, so that we can say that the trial court abused its discretion?

An examination of this record shows that but one juror was examined on his *voir dire*, and he was challenged peremptorily. Then the record is silent in every respect except that it certifies that twelve jurors were obtained, and we must assume that they were good men and true; for, with this extensive record, bristling with exceptions from beginning to end, and with the counsel who took the cause of the accused in hand and carried him through this trial, we must assume that they took care that a fair jury was secured. If they did not, it is now too late, for no exceptions to the jurors that were secured are now preserved in this record. The action of the court in overruling this motion was not erroneous.

The next question presented in the record is as to the admission of evidence. The admission of similar transactions to that which the accused was charged in the indictment. The indictment, consisting of but a single count, charged the defendant with the forgery of the following receipt:

“No. 3219, Newark, Ohio, September 27, 1899. Received of the Homestead Building and Savings Company seventy-five dollars, in full, for one W. D. share No. 18, Sec. No. 1, W. D. Theo. Taylor.”

Revised Statutes, Section 7091, provides that whoever falsely makes, alters or forges * * * any receipt for money * * * *with intent to defraud* is guilty of forgery. * * * It is to be observed that there is no count in this indictment for *uttering* the forged instrument. The question then arises: May similar transactions be shown, and for what purpose?

In the case of *Reed v. The State*, 15 Ohio, 223, on the trial of a person charged with passing counterfeit money, it was held that it was competent to prove that he had passed other counterfeit money, for the purpose of proving the *scienter*, or guilty knowledge; but in the case of *Barton*, 18 Ohio, 221, it was held that proof of similar offenses in the case of *grand larceny* could not be admitted in the trial of the case. The

court, in its opinion, thus stated the rule: "each case must be tried on its own merits and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes." In this case it was claimed on behalf of the state that this evidence was introduced for the purpose of showing *the intent* with which the accused got possession of the property.

In the case of *Farrer v. The State*, 2 O. S., 54, the syllabus is as follows:

"On an indictment charging the prisoner with poisoning A in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of August previous." In this case, the court, consisting of five judges, divided; Corwin (who announced the principal opinion in the case), Caldwell and Thurman, were for reversing the judgment on the ground that it was erroneous to admit evidence of other transactions or other poisonings. Judge Thurman gives the controlling reason for the majority of the court. He says, on page 74:

"No presumption whatever of guilty knowledge arises from the bare fact of passing a counterfeit coin or note, unless, which is but seldom the case, its baseness is apparent, and the person receiving it is a fit subject for imposition.

"But how is it with respect to the nature of arsenic? Is it not undeniable that the fact is almost or quite as well known to people generally that arsenic is a deadly poison, as that a dagger or a gun is a deadly weapon? I think it is. I suppose that there are very few men or women, and but few children, either, except those of tender years, who have not heard of arsenic, and that it is a poison that produces death."

And then he proceeds to say that the presumption obtains at once from the use of the means employed, that there was *guilty knowledge* and *intent*. Judge Ranney says:

"I think a new trial should have been granted, because of the misconduct of the jury, and for that reason *alone* I vote to reverse the sentence."

Bartley, C. J., on page 81, quotes, with approval, from Justice Story, in an opinion handed down by him, and claims the rule to be:

"In most cases of conspiracy and fraud, the question of *intent or purpose*, or design in the act done, whether innocent

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or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency, and often occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases, where the guilt of the party depends upon the *intent*, *purpose* or *design*, with which the act is done, or upon his *guilty knowledge* thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose or knowledge. * * * In short, whenever the *intent* or *guilty knowledge* of a party is a material ingredient in the issue of the case, these collateral facts tending to establish such intent or knowledge, are proper evidence."

In the case of *Brown v. The State*, 26 O. S., 176, the syllabus is as follows:

"1. Testimony otherwise competent, as tending to prove the offense charged in the indictment, is not rendered incompetent by reason of the fact that it tends to prove a separate and distinct offense."

This was an indictment for maliciously injuring a mare. The state, in the trial, was permitted to show that a number of other horses were injured in a similar manner; the defendant objecting on the ground that this was in effect putting him on trial for different offenses at the same time.

Gilmore, J., on page 181, in respect to this objection says:

"While the general rule, unquestionably is, that a distinct crime, in no way connected with that upon which the defendant stands indicted, can not be given in evidence against him on the trial, this rule is not applicable to a case in which it is clearly shown that a connection in the mind of the defendant, must have existed between the offense charged in the indictment and others of a similar nature. When such connection exists, evidence of such other offense is admissible, not for the purpose of raising a presumption of guilt on the hypothesis that a man who commits one crime will probably commit another, but for the purpose of showing a motive or purpose prompting the commission of the offense laid in the indictment; and being competent for this purpose, it could not have been properly excluded on the ground that it tended to prove the commission of other and distinct offenses."

In the case of *Lydia Devere v. The State*, 5 C. C., 509, Lydia Devere was indicted in the Common Pleas Court of Lucas County for the crime of forgery. There were two counts in the indictment. The first count charged that she unlawfully and falsely made and forged a certain promissory note for the payment of money, setting forth a copy of the note, and that she forged an endorsement on the back of the same. The second charges that she falsely and unlawfully did utter and publish as true and genuine this promissory note, being the same instrument.

In that case the common pleas court permitted the proof of similar transactions as developing and showing a scheme to defraud—a purpose in making and uttering the fraudulent instrument, as showing the guilty knowledge and criminal intent. This was excepted to, and the case went to the circuit court. Judge Bentley delivered the opinion, holding it was proper to show these as evidence of *criminal intent*.

The circuit court found that the two constituted but a single offense; that the falsely making and uttering alone constituted forgery, and was not two crimes. Under these counts of the indictment this woman was convicted and sentenced on each count. The circuit court reversed the court of common pleas, holding it was but a single offense and that she could be sentenced for but a single offense, the crime of forgery.

“It appears that she has been properly convicted of the crime of forgery, and should be sentenced to a term as for the one offense of forgery. For the reasons given, this sentence will be reversed, and the cause remanded for a proper sentence upon the verdict as for a single offense.”

After the circuit court reversed the judgment, and remanded it for a new sentence, the court of common pleas sentenced the defendant for a term of nine and a half years, and that sentence was brought before the circuit court “*pro forma*” on petition in error, and that sentence was affirmed, and the case taken to the Supreme Court on motion for leave to file a petition in error, which motion was overruled by the Supreme Court.

In the case of *Lindsey v. The State*, 38 O. S., 507, the defendant was indicted for uttering and publishing a forged deed. On

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the trial the court admitted certain other forged deeds published by the defendant, and others found in his possession. In affirming the judgment of the lower court, Johnson, J., on page 514, says:

“As guilty knowledge is an essential ingredient of this class of crimes, and as the burden is on the prosecution to prove such knowledge, the reason of the rule is apparent. Without the aid of other acts and conduct of the accused, it would be impossible to prove this allegation. Proof of the single act charged will not of itself warrant the inference of guilty knowledge. Hence this exception to the general rule, that other acts of the accused calculated to raise a presumption of such knowledge are admissible. Other acts which, in their nature, do not aid the jury in determining this question, are not competent, but when such acts or conduct tend to raise a presumption of such knowledge, they are admissible.”

These are the principal cases in Ohio. Let us now look beyond our own state, and see whether we can ascertain the correct rule in respect to this question.

The case of *Taylor v. The State*, reported in the 81 S. W. Rep., 933, is a case from the Court of Criminal Appeals of Texas, decided in 1904. This is the language of the syllabus:

“On a trial for forgery, evidence of other forgeries by defendant is admissible on the issue of intent, or to show a system.”

Judge Brooks, delivering the opinion of the court, says:

“We would not be understood as holding that contemporaneous suspicion against appellant would be admissible, but contemporaneous acts tending to show and make out a *prima facie* case of forgery or passing a forged instrument are proper and introducible in the case. The collateral forgeries are merely introducible, and the court should say so, for the purpose of illustrating the motive, system, and intent, if they do so illustrate the motive, purpose and intent of appellant in passing, as true, the forged instrument for which he is on trial.”

In the case of *The People v. McGlade*, 72 Pac. Rep., 600, this being the 139 Cal., decided in 1903, the court says:

“In a prosecution for forgery, evidence of other forgeries or similar instruments about the same time was admissible, to

to show guilty knowledge and intent." Also, the 34 So. Rep., page 1000.

It has been called to our attention in the briefs of counsel, that in many of these cases, there are two counts in the indictments, one for forging the instrument, for which the accused is on trial, and one for uttering the same. But it seems that in this case it was simply for forgery. They hold in this case, that evidence of other orders are proper in the case, if the proof shows that they were made about the same time.

In the 156 Mass., 196, the same question was before that court. This is in the opinion of Judge Barker:

"It is an established exception to the rule forbidding proof of collateral facts, that, in prosecution for forgery and for uttering forged paper, proof is admissible, in order to show an intent to defraud by the forgery, and also to show knowledge on the part of the accused with reference to the particular document which he is charged with uttering, that at or near the time of committing the alleged offense, he had passed, or had in his possession, other similar forged documents. The admission of such evidence is necessary, because guilty knowledge is a fact not susceptible of proof by direct evidence, and can rarely be shown by explicit admissions, but only by acts and conduct. Intent to defraud often sufficiently appears from the circumstances of the transaction, where its immediate and necessary effect is to defraud; *but there are many cases of the false making of instruments which have no such necessary effect, and in which the fraudulent intention must be proved by other and collateral circumstances.* Although the introduction of such evidence compels the defendant to meet acts not charged, and may lead the jury to convict of one crime upon proof of another, it is admitted when the occasion arises. This doctrine is a branch of a more general exception, which, when knowledge or intent must be proved, allows evidence of acts not in issue, but which tend to show such knowledge or intent, as in the trial of indictments for passing counterfeit money."

But the point that I call attention to particularly is that *the intent to defraud often does not sufficiently appear from the circumstances of the transaction, and the making of the false instrument may have no such necessary effect.* It is a forgery to make an instrument which may be capable of defrauding, although in and of itself, it may be innocent, but in

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conjunction with other facts and circumstances may constitute the crime of forgery.

In the celebrated case of *People v. Molineux*, reported in the 168 N. Y., 298, and in the 61 N. E. Rep., 286, the Court of Appeals of New York followed the Supreme Court of Ohio in dividing upon the question as to the admission of testimony in the case of the administration of poison.

Judge Warner, in speaking for a majority of the court, thus states the rule as to the admission of evidence showing that the accused has been guilty of other similar crimes:

“The exception to the rule can not be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged, when it tends to establish (1), motive; (2), intent; (3), the absence of mistake or accident; (4), a common scheme related to each other that proof of one tends to establish the others; (5), the identity of the person charged with the commission of the crime on trial.”

And, on page 296, he thus lays down the rule:

“There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had.”

And he then says:

“Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore, intent is of the essence of the crime, and previous offenses of a similar character by the same person, may be proved to show intent.” Citing a number of cases.

Judge Parker, who delivered a dissenting opinion, thus states the rule, on page 313:

“Intent is another essential element which must be made out before there can be a conviction for a crime, and, if the commission of another crime by a defendant tends to establish a guilty intent on his part in the case on a trial, the other crimes may be proved.”

In the case at bar the crime charged was the false making of a receipt for the payment of money, with intent to defraud. The instrument laid in the indictment might be harmless in and of itself, as has been urged upon our attention. It could not, in and of itself, be capable of defrauding unless in conjunction with some other instruments showing a system, or showing a means or capability whereby it could be used to defraud. And, therefore, we think, under the rule of law clearly deducible from the authorities cited, that similar offenses or similar transactions showing the motive or intent with which this receipt was made, altered, or forged, were proper, and that by using it in conjunction with other instruments forged by the defendant it was capable of defrauding, and the admission of such evidence was not erroneous. It was proper.

There were a number of special requests handed to the trial court, some of which were given, and some were refused. Those that were declined by the trial court, we think, are governed by the case of *Davis v. The State*, in the 63 Ohio State, 173, and were properly refused by the trial court.

While this record, as I have said, bristles with exceptions from beginning to end, we find no error therein to the prejudice of the plaintiff in error, and the judgment of the court of common pleas will be affirmed with costs, and the cause remanded to the common pleas court for execution. Exceptions will be noted.

Smythe & Smythe and *F. V. Owen*, for plaintiff in error.

J. R. Fitzgibbon, Prosecuting Attorney, and *S. M. Hunter*, for defendant in error.

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Muskingum County.

MANDAMUS AGAINST A CLERK OF COURT.

[Circuit Court of Muskingum County.]

STATE, EX REL LOUIS SOLLER, V. JAMES A. BROWN, CLERK.

Decided, April, 1906.

*Order of Court—Dispute as to Interpretation of—Mandamus will not
Lie to Compel a Clerk of Court to Comply with—Proper Remedy.*

Where a court has ordered one of the parties to an action then pending to deliver to the clerk of the court a good and sufficient warranty deed to certain property, and has directed the clerk to pay over to the said party the purchase price of the property in question, then in the hands of the clerk, such party can not, by suit in mandamus, compel the clerk to comply with the order on tender of a deed, where a dispute has arisen as to the sufficiency of the deed under the order. The proper remedy is to secure a determination of the dispute by filing a motion in the original case.

McCARTY, J.; DONAHUE, J., and TAGGART, J., concur.

Mandamus.

This is a mandamus proceeding, the nature of which can not be better stated than by reading the pleadings:

“The relator says that the defendant is the Clerk of the Courts of Muskingum County, Ohio, and duly qualified and acting as such; that at the September term of the Court of Common Pleas of Muskingum County, Ohio, a certain action was pending in said courts, wherein Louis Soller was the plaintiff and Andrew Arnold was the defendant; and at said term, to-wit, on the 9th day of September, A. D., 1905, it was ordered by said court that Louis Soller, the plaintiff in said action, should within the days execute and deliver to said defendant a good and sufficient deed for certain real estate therein described. Said order was made by said court upon the answer and cross-petition of said Andrew Arnold, praying for specific performance, and it was further ordered by said court that, upon said deed being executed and delivered as therein directed, said clerk of courts pay to plaintiff in said action, and being the relator in this action, the sum of \$3,037.50, the said sum being then in the custody and control of said court, being the amount of the purchase money for said place that was

found by said court to be due from said Andrew Arnold to said Louis Soller, as purchase money for said premises in said petition described.

“The relator further says that within ten days from the ninth day of September, said deed was tendered by relator to said clerk of courts and payment of said money demanded and said clerk refused and still refuses to make payment to relator of said sum of money as ordered by the court as aforesaid.

“Wherefore, your relator prays that a writ of mandamus be issued commanding said defendant as clerk of said common pleas court to pay to the said relator the amount found due to him and ordered to be paid to him by said court of common pleas.”

To that petition an answer has been interposed as follows:

“The defendant for answer to the petition herein filed, admits that he is the Clerk of the Courts of Muskingum County, Ohio, and duly qualified and acting as such, and that at the September term of the Court of Common Pleas of Muskingum County, Ohio, a certain action was pending in said courts, wherein Louis Soller was the plaintiff and Andrew Arnold was the defendant.

“Defendant further answering says that it is not true that on or about September 9, A. D., 1905, it was ordered by said court that Louis Soller, the plaintiff in said action, should within ten days execute and deliver to said defendant a good and sufficient deed for the real estate therein described, but on the other hand that on said date it was ordered by said court that Louis Soller, the plaintiff in said action, should within ten days execute and deliver to said defendant a good and sufficient warranty deed for the real estate therein described; that it is not true that said order was made by said court upon the answer and cross-petition of said Andrew Arnold praying for specific performance, but that said order was made upon the amended answer and cross-petition of said Andrew Arnold.

“Defendant further answering says that it was, by the court, further ordered that upon a good and sufficient warranty deed being executed and delivered to the said Andrew Arnold, as therein directed, this defendant was to pay to the said Louis Soller the sum of \$3,037.50, and this answering defendant admits that said sum was then and there in the custody and control of said court, the same being the amount of the purchase money for said premises that was found by said court to be due from said Andrew Arnold to said Louis Soller as and for purchase money for said premises in the petition described. This answer-

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ing defendant says that it is not true that within ten days from September 9 a good and sufficient warranty deed was tendered him by the relator herein, but admits that the relator herein, through his attorney, tendered him a deed signed only by Louis Soller, who was at that time a married man, and whose wife was then and there living, which fact was known to this defendant, and that said deed was only signed by Louis Soller, which deed this defendant refused and still refuses to accept for the reason that the same is not a good and sufficient warranty deed, as was ordered by the court to be made.

“Wherefore, this defendant prays that this writ of mandamus be dismissed at the cost of relator herein and for all other relief that is just, equitable, and proper.”

These are all the pleadings in this case, and the question propounded to us is whether or not the plaintiff relator is entitled to the specific remedy of mandamus.

We have been referred to some authorities, one of which is *Peoples' Sav. Bank Co. v. Parisette*, 68 Ohio St., 450:

“Where a vendor of land has obligated himself by written contract to convey ‘by good warranty deed and abstract of title from organization of county,’ but the contract contains no stipulation for a deed containing a covenant against incumbrances generally and none against any inchoate dower right, it is not essential to the performance of the contract by the vendor that his wife should join in the deed and release her right of dower.

“Where, in an action brought in a court of equity to enforce the specific performance of a contract for the sale of land by the purchaser against a married man, the owner of the fee, who alone signed the contract, it appears by the contract itself that some one other than the husband was expected to sign it but has not done so, and the contract contains a stipulation to convey by a good warranty deed, but contains no agreement for a covenant against incumbrances, and it appears further that the wife has not agreed to sign such contract or in any way release her inchoate right of dower in the land, and that the purchaser at the time knew that the vendor had a wife who would, under the law, be entitled to a right of dower, and there is no collusion between the husband and wife relating to the contract or deed, the court will not decree specific performance against the husband with an abatement in the contract price of the land of the estimated value of the prospective dower of the wife.”

The claim of the defendant is that the money is now in court, the clerk, as the officer of the court, being in custody of the same, and, this dispute having arisen, all that remains for the plaintiff to do is to ask that the court order and direct payment thereof, and that he, as such clerk, is not authorized or empowered to settle the dispute between the parties, but that the plaintiff may have full relief simply by filing a motion in the original case, asking the court to find that he has complied with its order and directing the clerk to make payment thereof, and thereupon, there being full and adequate remedy at law, mandamus will not lie. We think this claim is correct. There is no reason for making the extraordinary remedy of mandamus. Plaintiff can have full and adequate remedy from such a motion, and therefore, by the very terms of the statute mandamus will not lie or is not necessary. The peremptory writ is refused and costs taxed against the plaintiff. Motion for new trial overruled. Exceptions. Execution awarded.

F. S. Gates, for plaintiff.

C. C. Lemert, for defendant.

JUDGMENTS FOR ALIMONY.

[Circuit Court of Cuyahoga County.]

CARL M. HOFFMAN V. MINNIE HOFFMAN.

Decided, October 29, 1906.

Divorce and Alimony—Order that Alimony be Paid in Installments—Husband not Absolved from Payment by a Second Marriage—Enforcement of Payment by Contempt Proceedings.

Where a wife obtains a decree for divorce, with an order that the husband pay to her alimony in a stipulated sum per month until the gross amount allowed has been paid, the judgment for alimony cannot be defeated, or a commitment to jail for failure to pay avoided, by the subsequent marriage of the defendant to another woman and the setting up by him of the claim that all of his meager salary is required to support his new family.

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MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

In November, 1903, Minnie Hoffman was granted a divorce from Carl M. Hoffman, and a decree entered that Carl pay her as alimony, the sum of \$15 per month until the aggregate amount paid should be \$750. He paid the monthly installments up to the month of April, 1906, when he was in default, and proceedings in contempt were brought against him, and on the 21st day of April, 1906, he was found guilty and ordered to pay to Minnie Hoffman \$15 on or before the 10th day of May, 1906, and in default of such payment that he be committed to jail until payment should be made, or until he be otherwise discharged by due course of law.

Error is prosecuted to this order, because it is said the facts show that Mr. Hoffman had a good and lawful reason for not paying. This reason was that, less than two weeks after the divorce was obtained against him, he married another woman, whereby he became a husband living with his wife. He is a resident of Ohio, and neither he nor his wife is the owner of a homestead. His earnings are but \$15 per week and it takes it all, he says, to support himself and his new family.

It is manifest that if this decree for alimony were an ordinary debt, nothing could be collected upon it except as he saw fit to pay. But it is not a debt in the ordinary sense; it is not a judgment in the ordinary sense. See *The State, on Complaint of Cook v. Cook*, 66 O. S., 566. The second clause of the syllabus reads:

“A final decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt, but it is such an order that, under favor of Section 5640, R. S., punishment as for a contempt may follow a willful failure to comply with it.”

And in the opinion in the same case, at page 572, speaking of the obligation to pay alimony, Judge Spear says:

“It seems manifest that so far as the obligation of the husband enters into the consideration and affords a basis for the court's action, it is not a debt in the sense of a pecuniary obligation;

it arises from a duty which the husband owes as well to the public, as to the wife. * * * The liability originates in the wrongful act of the husband.”

Again he says, on page 573:

“The withholding of this allowance, therefore, by the husband, when able to respond, is a refusal to abide by and perform the order and decree of the court, and it is difficult to see why such refusal should not be punished as a contempt, for the same reason and upon the same grounds that orders and decrees of courts of equity, in injunction and the like, are in like manner enforced.”

The only remaining question is, whether this plaintiff in error was unable to perform the order made.

He gets but \$60 per month, or at most \$15 per week. He goes into detail somewhat about his expenses and shows that he is expending this amount in the support of himself and his present wife, but his evidence fails to show that, by close economy, he could not get on with less. It needs no going into details to show that it would require close economy, very close economy, to support his present family and pay this alimony, but no reason appears why he and his present wife should not be required to exercise the closest economy that this alimony should be paid.

With the order upon him to pay the alimony he saw fit to marry another woman. She, presumably knowing that his treatment of his former wife had been such as to entitle her to a divorce and to this alimony, both of them knowing this, they chose to marry one another; they must abide the consequences. It would be a travesty to allow this husband to defeat the order of the court by voluntarily taking upon himself new obligations, and then have them treated as superior to the obligations already incurred by him to his former wife and to the public as determined by the court.

Judgment affirmed.

Miller & Linder, for plaintiff in error.

Kerruish & Kerruish, for defendant in error.

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Cuyahoga County.

EXTENSION OF PERIOD FOR PAYMENT OF TAXES.

[Circuit Court of Cuyahoga County.]

THE STATE OF OHIO, EX REL FREDERICK C. BEYER, v. JAMES P.
MADIGAN, AS TREASURER OF CUYAHOGA COUNTY.*

Decided, October 29, 1906.

Constitutional Law—Taxation—Collection of Taxes—Statutory Provisions Which are not of Uniform Operation—Section 1365-25—Mandamus—County Commissioners—County Treasurer.

While the subject of taxation is general in its nature, requiring uniformity of operation throughout the state, the provision in Section 1365-25 giving to county commissioners power to extend for thirty days, at their discretion, the time for the payment of taxes, although limited to "counties containing a city of the second grade of the first class," must be regarded as a provision suited to certain localities and merely regulative of the mode of receiving taxes in such localities, and is therefore constitutional.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

This mandamus proceeding involves but one question, viz., the constitutionality of the last clause of Revised Statutes, Section 1365-25. This section was originally part of an act fixing the salaries of county officers in Cuyahoga county; and, so far as that subject-matter is concerned, it is confessedly unconstitutional, under recent rulings of the Supreme Court, particularly *State, ex rel, v. Yates, Auditor*, 66 O. S., 546, as being an act of a general nature not of uniform operation throughout the state. The section here in controversy reads:

"It shall be the duty of the county commissioners to see that the provisions of this act are faithfully complied with, and that the county commissioners shall also have power to extend at their discretion for thirty days, the time for the payment of taxes."

The petition here alleges that the commissioners have passed a resolution extending the time for the payment of the first half of the taxes for the current year from December 20, 1906, to January 19, 1907; but that the defendant, as county treasurer, has publicly and officially declared that he will insist upon the

* Reversed by the Supreme Court November 27, 1906.

payment of said taxes by the former date, and that he will not be governed by said resolution. The petition further alleges that the relator, as a tax-payer of said county, and all others in like case, will incur a penalty should they erroneously rely upon the right of said county commissioners to direct and control the conduct of the treasurer in that respect. To this petition the defendant has demurred.

It is, of course, true, that if the commissioners' resolution and the statutory provision on which it is founded are invalid, the treasurer in pursuance of his duty to collect taxes due, may, after December 20, 1906, resort to distress or other summary remedy prescribed by law to collect taxes payable on that date together with a five per cent. penalty thereon.

The sole contention made by the defendant here is that the section referred to is unconstitutional. In its present form this section was enacted May 12, 1902 (95 O. L., 573) as "An act to amend Section 1365-25 of the Revised Statutes of Ohio." It was originally enacted April 12, 1889 (86 O. L., 64), as part of "An act relating to the duties and compensation of certain county officers and their assistants, in counties containing a city of the second grade of the first class."

It is admitted that Cuyahoga county is embraced within these descriptive words and that the act applies to no other county. It is true, also, that the constitutionality of that part of the act which relates to the time of paying taxes in Cuyahoga county is not necessarily involved in the fate of that portion which relates to the subject of salaries of county officers in this county, and which was passed upon in a former decision of this court. Nor is the style and form of this act, as distinguished from its subject-matter, conclusive against it. *State, ex rel, v. Bloch*, 65 St., 370.

As is well known, the recent decisions of the Supreme Court have revolutionized the principles of constitutional interpretation, as applied to the judicial construction of the meaning and application of the expressions "general laws," "laws of a general nature" and "special acts" as contained in the Constitution of this state. In *State, ex rel, v. Spellmire et al*, 67 O. S., 77, the rule is laid down in the first paragraph of the syllabus as follows:

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“Whenever a law of a general nature having a uniform operation throughout the state, can be made fully to cover and provide for any given subject-matter, the legislation, as to such subject-matter, must be governed by general laws, and local or special laws can not be constitutionally enacted as to such subject-matter.”

In that case the subject-matter of schools and school districts was declared to be of a general nature. In a previous decision, that of *Hixson v. Burson*, 54 O. S., 470, roads and highways had been declared to be a subject-matter of a general nature.

Gentsch v. State, 71 O. S., 151, presents serious difficulties. There an act was held valid prescribing a time for keeping the polls open at elections in cities with a population of 300,000, or more, different from that prescribed by the same act for other parts of the state. It was held that the subject-matter of the act, to-wit, elections, was of a general nature, but that the uniformity of its operation was not negatived by the special provision for cities above a certain size. The act was, indeed, in “operation throughout the state,” and it was *held* to be “of *uniform* operation throughout the state.”

It is argued that this decision, though correct as to the result, might better have been put on another basis. . For mere regulative details with respect to the conduct of elections in different localities to meet special conditions, may well be considered a subject local in its nature, and hence a proper subject of local or special legislation, though the elective franchise and substantive laws governing its exercise are of a general nature and must, therefore, be of uniform operation throughout the state. Thus it is claimed that the provision of law under consideration in *State v. Gentsch*, might well be deemed to be of a local nature, and hence not required to be of uniform operation throughout the state.

And it is, indeed, upon a precisely similar distinction that the decision in *Silberman v. Hay*, 59 O. S., 582, is discriminated from that of *McGill v. State*, 34 O. S., 228. The one case held invalid the law prescribing restrictions upon the right of jury trial in Cuyahoga county different from those obtaining elsewhere. The other case upheld a law prescribing a method of selecting persons for jury duty in this county different from that provided for

other counties. Superficially the subject-matter of both acts would seem to be the same, to-wit, juries, a subject manifestly of a general nature. Actually, however, there are two subjects, to-wit, the right of jury trial and the selection of persons for jury duty. The former is clearly of a general nature; the latter, a matter solely for administration, to be regulated according to local exigencies. And it was so held. The second paragraph of the syllabus of *McGill v. State* is as follows:

“The act of May 7, 1877, (74 Ohio L., 218), regulating the selection of jurors for the county of Cuyahoga, is not a law of a general nature within the meaning of Section 26, Article II, of the Constitution.”

In *Silberman et al v. Hay*, 59 O. S., 589, it was said by Minshall, J., at page 589:

“The law here in question affects the right of trial by jury—a subject of general interest throughout the state; the law considered in the *McGill* case simply affects the mode of selecting electors for jury service; and in this regard, local circumstances may, in the interests of the integrity of the system, require special legislation.”

In the case before us, if the subject-matter of this portion of the act be deemed to be taxation, it is, of course, of a general nature, requiring uniform operation throughout the state. But if the subject-matter here be deemed to be the regulation of the mode and time of receiving payment of taxes, it is not clearly of a general nature. May it not be true that the times and methods of selecting persons for jury service, and of receiving payment of taxes, are matters of regulative detail capable of being fixed and determined by reasonable local or special laws suited to the exigencies of each case and the real needs of each locality as the Legislature shall determine? True, the case of *Gentsch v. State*, *supra*, is apparently put by the Supreme Court on a different footing; and the case of *McGill v. State*, *supra*, is severely criticized in *State. ex rel, v. Spellmire*, *supra*. But when *Silberman v. Hay*, *supra*, was decided, the Supreme Court had already announced the doctrine of *Hixson v. Burson*, *supra*, and there was a clear opportunity, nay a clear duty, to reverse *McGill v. State*, if such reversal were ever contemplated.

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It is evident from the foregoing that the law now under consideration is far from being clearly an act of general nature; and hence the want of universal operation territorially throughout the state is not manifestly fatal to its validity. The Legislature may well have been actuated in passing this law by considerations of local conditions which require a longer time for the preparation of the duplicate and the receipt of taxes in a county containing a city of the magnitude of Cleveland. Revised Statutes, Section 2863, also recognizing this situation, gives the auditor forty days more in this county for the delivery to the treasurer of his duplicate, than is given in other counties. Revised Statutes, Section 2864, gives him a fortnight longer to prepare and publish his delinquent land list. The statutes abound in other like exceptions. Much and grievous harm might easily result not only to the local tax-payers and to this community generally, but even to the integrity of the taxation system in the state, if the courts were to declare as a matter of law, that the Legislature could and should have passed adequate general laws of uniform operation throughout the state on the subject of the time and manner of receiving payment of taxes in each and every county, great and small alike. No inconvenience can result to the public from a judicial recognition of the sound discretion of the Legislature in thus interpreting its own constitutional duty in this behalf.

The rule of interpretation laid down for the courts is that expressed by Spear, J., in *Marmet v. State*, 45 O. S., 63, at page 64:

“If the law, as to the provisions involved in this inquiry, is shown to be *clearly, palpably* in conflict with the Constitution, so that there is no doubt or hesitancy in the mind of the court, it should be so held. But if there be any doubt upon the subject, that should be solved in favor of the law, and the court should decline to interfere.”

Holding the views thus expressed, we are of the opinion that the demurrer to the petition should be overruled, and it will be overruled, and a mandatory writ will be issued as prayed for, provided the plaintiff cares to avail himself of the right to amend his petition by interlineation, so as to include an express allegation of the admitted fact that Cuyahoga county was a county

containing a city of the first class, second grade, at the time this law was made.

R. A. Wilbur, for plaintiffs.

Blandin, Rice & Ginn, for defendant.

TAXATION OF LAND APPROPRIATED FOR STREETS.

[Circuit Court of Hamilton County.]

THE COMMISSIONERS OF HAMILTON COUNTY, OHIO, v.
GEORGE F. ALBERS ET AL.

Decided, June 11, 1906.

Refunder—To the Owner of a Subdivision—For Land Included in the Streets—Erroneous Direction by Auditor to Assessor—As to Valuation to be Placed on Lots—Presumption as to Valuation Made by Assessor—Section 1038.

1. There is a presumption that in valuing the lots of a newly platted subdivision for the purpose of taxation, the valuation returned by the assessor covers the lots only, and not the land dedicated for street purposes, and without a showing to the contrary the subsequent allowance of a refunder on account of land embraced in the streets is erroneous.
2. A direction given by a county auditor to an assessor as to the minimum aggregate valuation at which he shall return the lots of a new subdivision is without authority, and the return of the assessor may be corrected under the provisions of Section 1038 in so far as the assessor was influenced in his valuations by the direction of the auditor; but where it is left to inference only as to whether the direction was followed by the assessor or served to influence his valuations, relief can not be granted by the courts to the lot owners.

GIFFEN, J.; JELKE, P. J., and SWING, J., concur.

The defendants in error, George F. Albers and Henry W. Kahle, were the owners of a tract of land of ten and one-half acres, the decennial appraisement of which was \$11,860. August 14, 1891, they presented to the county auditor a plat, subdividing this tract into fifty-seven lots. The auditor referred the same to the annual assessor and directed him to appraise the lots so that the aggregate tax valuation of said lots should not fall below \$18,860.

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Subsequently, the assessor returned said subdivision to the county auditor, and valued said fifty-seven lots separately, the valuation aggregating \$21,410.

An application was made to the county commissioners for a refunder of taxes paid on the decennial valuation of that part of land dedicated to the public for street purposes, amounting to \$2,970, and upon the amount of \$7,000, being the difference between the decennial appraisalment as shown by the record, and that given by the auditor to the annual assessor. The claim was rejected by the county commissioners, and upon appeal to the court of common pleas, the taxes paid on that part of the land dedicated was allowed and the balance disallowed. The commissioners have filed their petition in error, and Albers et al a cross-petition in error.

In addition to the questions this day decided in the case of *Davis and Cassatt v. The Commissioners, ante*, one is presented by the petition in error, to-wit: Whether the value of the land dedicated for street purposes should be deducted from the decennial valuation, and a refunder be allowed of the proportionate amount of the taxes paid on the whole? The other by the cross-petition, to-wit: Whether the error of the auditor in directing the assessor to return a valuation of not less than \$18,860 while the decennial valuation was only \$11,860, was such an error as could be corrected, under Section 1038, Revised Statutes?

There is no authority under Section 2797 to return the land embraced in the streets for taxation, but the lots shall be entered on the tax list in lieu of the land. There is no finding of fact that the defendants in error paid taxes upon any of the land dedicated, although, under its conclusions of law, the court states that the appellants paid taxes on the property embraced in the streets. We understand the contention of counsel to be that upon filing the plat with the auditor, it was his duty to deduct from the decennial valuation of the tract of land a proportionate value of the land dedicated to public use.

If our conclusion in the case of *Davis et al v. The Commissioners*, is correct, the valuation of the lots in the subdivision is left to the judgment of the assessor, subject to the limitation that he have regard to the next preceding decennial valuation of real estate.

The purpose of subdividing land into lots and dedicating the streets, and the result which usually follows, is to add value to the lots abutting on such streets, and if the assessor should so find, it would be his duty to assess and return the valuation accordingly.

We are of opinion, therefore, that the court erred in allowing the claim for taxes paid on land embraced in the streets. The direction given by the auditor to the assessor to return a valuation of not less than \$18,860 was clearly erroneous, and if it fully entered into the judgment of the assessor in fixing a valuation upon the several lots, it would be such an error as was contemplated under Section 1038, but there is no finding of fact showing that the assessor followed the directions given except as may be inferred from the valuation returned. The total valuation returned was \$21,410, which is \$2,550 in excess of the sum below which the assessor was directed not to value the lots.

While we have no doubt that the instructions given influenced to some extent the judgment of the assessor, it would be impossible to determine to what extent or in what amount the valuation was thereby increased. Judgment will therefore be affirmed in part and reversed in part.

Ampt, Ireton & Collins, for plaintiffs in error.

Cobb, Howard & Bailey, for defendants in error.

MUNICIPAL FRONTAGE ON STREET RAILWAY ROUTES.

[Circuit Court of Cuyahoga County.]

TAYLOR EMERSON V. THE FOREST CITY RAILWAY COMPANY.*

Decided, October 29, 1906.

*Street Railways—Consents of Abutting Owners to Construction of—
Legality of Consent of Municipality as Abutting Owner—Public
Officials Acting in a Dual Capacity—Sections 1536-185 and 3439—
Jurisdiction of Council.*

The consent of a municipality to the construction of a street railway along a street upon which the municipality is an abutting owner may, when legally granted, be counted in ascertaining whether a majority of the frontage has consented to the granting of the franchise.

*Affirming *Emerson v. Forest City Railway Co.*, 4 N. P.—N. S., 493.

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HENRY, J.; WINCH, J., and MARVIN, J., concur.

This is an appeal from the judgment of the common pleas court denying a permanent injunction against the exercise by the defendant of its alleged street railway franchise on East Fourteenth street for want of the necessary majority of abutting owners' consents. It is admitted that the production of sufficient consents is jurisdictional and that without them the council is without power to grant a franchise. If the Fourteenth street frontage of the Erie Street Cemetery property owned by the city is to be included in estimating the total frontage, and if the city's consent given pursuant to ordinance of its council can be counted to make a majority, then the injunction should be denied.

The sole issue is thus one of law depending upon the construction of R. S., Sections 1536-185 and 3439, the latter of which reads in part as follows:

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof," etc.

And in part of the other section referred to is substantially the same provision. The literal reading of these sections is against plaintiff's contention. But it is urged that since the privilege of abutters to give or withhold their consents is a personal right given to them for their protection against the granting of the right to operate a street railway in front of their premises, contrary to their desire and interest, it is against public policy for the city, in its adversary and dual capacity as both landowner and grantor of the franchise, to confer upon itself jurisdiction to act in derogation of their rights.

There is of course a suggestion of anomaly in this situation. Various analogies of action by public officers in dual capacities have been instanced, but we have found none which precisely meets this situation.

It is not easy to see why the city as landowner should be deprived of the privilege enjoyed by landowners generally of favoring the establishment of a street railway by giving consent where

a street railway is deemed to be beneficial to the abutting property. And it is apparent that the denial of that privilege might hinder or prevent the establishment of a street railway along a street bordered largely or wholly by property belonging to the city, and that, too, when ease of access to such property by the public is peculiarly desirable, as in the case of city parks.

It is, indeed, conceivably true that the interest of the city as a whole may be favorable to the construction of a street railway along a street where its own and other abutting lands would be depreciated thereby, and that it may thus force the establishment of a street railway against the interests of the owners of abutting private property. But the same argument, in some degree, would lie against the right of any other public corporation, owning abutting city lands, to give or withhold consent to the construction of a city street railway in front of its property. Yet the right of the federal, or state government, or of a county or school district, in this behalf is, we believe, unchallenged. This privilege being personal to the owners of abutting lands, may be exercised even to the manifest detriment of the land itself, if they so please. Can it be doubted that a street railway company may, as owner of abutting lands, yield the decisive consent to the grant of a franchise to itself? It having been decided that consents may be purchased, can it be seriously claimed that any abutting owner who refuses to yield his consent can invoke high considerations of public policy against the contrary exercise of the same privilege by any owner, though it be the city itself, upon the ground of biased judgment, impure motive, conflicting duties, or cross-interests. Can supposed public policy of so doubtful a nature operate to vary the plain letter of the law? We think not.

Viewing the question from another standpoint and considering the history of this legislation, the rule of majority consents was formerly founded on assessed valuations of abutting property, so that the owners of property exempt from taxation had no power to further a street railway project by their consents. When the Legislature changed this basis to that of foot frontage, it obviously had this fact in view. It could hardly have escaped attention that the change thus made would affect property owned by the city. Yet the Legislature made no exception of city prop-

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erty. If it had expressly conferred upon municipalities the privilege of giving consent in respect of their property abutting on proposed street railway routes, it can hardly be claimed that considerations of public policy would defeat such provision. And the same conclusion results from the reasonable presumption that the Legislature must have had in contemplation the plain application and natural meaning in this behalf of the language it did employ.

If abuses arise from the literal interpretation of the law, it is much better that the Legislature should amend the law than that the courts by judicial legislation should attempt to do so.

The injunction will be denied, as upon final hearing, and the petition dismissed at the plaintiff's costs.

Squire, Sanders & Dempsey, for plaintiff.

Garfield, Howe & Westenhaven, for defendant.

EVIDENCE AS TO CONCEALMENT OF PROPERTY.

[Circuit Court of Cuyahoga County.]

THE RAVENNA NATIONAL BANK V. JAY E. LATIMER.

Decided, October 29, 1906.

Attachment—Burden of Proving Concealment of Property—Offers to sell at Low Figure—Weight of Evidence Presented by Affidavits—Reviewing Court in Same Position as Trial Court—Evidence Sufficiently Establishing Concealment of Property.

1. Where a case is heard on affidavits, the reviewing court has the same means of judging as to the weight of the testimony or the credibility of the witnesses as the trial court, and should treat such testimony as though it were presented in the reviewing court for the first time.
2. An offer by a debtor to sell a piece of property at a low figure, and to accept notes and mortgage for all or a large part of the purchase price, it is not sufficient when standing alone to establish a purpose on the part of the debtor of placing his property beyond the reach of creditors.
3. But a charge of concealment of property will be regarded as sufficiently proven, where sustained by the testimony of a number of witnesses as to declarations made by the debtor at different times that he was execution proof and that his property had all been placed beyond the reach of creditors.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Error to the court of common pleas.

Suit was brought by the bank against Latimer on a promissory note, and an order of attachment was issued against the defendant upon an affidavit filed by the plaintiff's attorney, charging as grounds therefor that the defendant was about to sell and convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors, and that said defendant had property or rights in action which he concealed.

The defendant moved to discharge the attachment on various grounds, none of which need here be considered except the third and fourth grounds. These read:

"3. It is untrue that defendant is about to sell and convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors.

"4. It is untrue that defendant has property or rights in action which he conceals."

In support of this motion the defendant filed his own affidavit, asserting that these matters contained in the affidavit upon which the order was granted, and mentioned in the third and fourth grounds of the motion, were untrue. This put upon the plaintiff the burden of sustaining the allegations in this regard.

The matter was heard in the court below upon affidavits, with the result that the court ordered the attachment discharged. To reverse this order error is prosecuted here.

We have before us in a bill of exceptions all the evidence on which the court acted, and this, as already said, is in the form of affidavits. It is true there are depositions in the bill, but these bear upon the ownership of the note sued on, and there is no question that the plaintiff was such owner, so that all we need consider is the weight of the evidence as appears by the affidavits.

It differs from the ordinary case in which we are called upon to determine in proceedings in error the weight of the evidence, in this, that whereas usually the trial court and the jury see the witnesses and can note their manner and bearing and so have better means of judging what weight should be given to their testimony than a reviewing court. In this case the trial court

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did not have the witnesses before it, and had no better means of judging than this court has. In this respect the language used by Judge Gholson in the opinion in the case of *Harrison v. King*, 9 O. S., 397, does not apply. That language is:

“But there was offered on both sides what the code declares to be proper evidence, and we are called upon to review the decision of the court below as to the credibility of the witnesses and the weight to be given to their statements. We may very reasonably conclude from the different phases of the complicated controversy bringing the parties so frequently before the court, that the judge who decided the motion had advantages in forming an opinion which we do not possess.”

There is nothing in this case to show or to make probable that the court below possessed any means of judging of these affiants not possessed by us. We are therefore to judge the matter as though the motion to discharge was addressed to us. So judging of it, we reach a different conclusion from that reached below on one phase of the case.

We do not think that the evidence was sufficient to show that the defendant was about to sell his property or convert it or a part of it into money for the purpose of placing it beyond the reach of his creditors. True, he offered to sell his farm at what was apparently a very low figure and to accept notes and mortgages for all or a large part of the purchase price, but this one who is in debt may do for the very purpose of getting means to pay his debts.

On the other question we think the court should have found that the defendant had property which he concealed.

Jas. W. Holcomb makes affidavit that the defendant told him, on the 10th day of March, 1906—the affidavit for attachment was made on the 24th day of the same month—that he had no property that could be found on which to levy if judgment should be recovered against him; that he could pay the debt if he wanted to, but that his property was beyond the reach of his creditors. He says that again, on the 15th day of the same month, Latimer told him that he could pay a certain judgment which had been rendered against him if he wanted to, but that he would not; that he had no property that any one could find; that his property was out of the reach of his creditors.

B. B. Patterson makes affidavit that on the 20th of March, 1906, Latimer told him that he had plenty of property to pay any of his outstanding indebtedness, but that he could not be forced into paying anything he did not want to.

Jerome F. Patterson makes affidavit that on the 16th of March, 1906, Latimer told him that he had plenty of property with which to pay this note if he wanted to pay it, but that he was execution proof. He says this was repeated in his hearing March 20, 21 and 22, 1906, and that he heard him say to B. B. Patterson what said B. B. Patterson swears to in his affidavit.

He says, too, that on the 24th day of March, 1906, Latimer said to him that if he sued this note he could get nothing, but that his property would all be beyond the reach of his creditors. These conversations are denied and explained by Latimer, but it seems clear that the weight is decidedly with the plaintiff, that the statements were made and that they clearly show that the defendant was concealing his property to evade the payment of certain of his debts.

Remembering that there was nothing known of the appearance and character of the witnesses which is not known to us, and the fact being that two of the affiants are well known and reputable members of this bar, we reach the conclusion that these statements were made. If they were made and their truth is now denied, what is said in *Hanks v. Andrews*, 13 S. W., 1103, is decidedly in point. The language is:

“If his representations as to his assets were false, the falsehood does not increase confidence in his intention to make an honest disposition of them.”

Finding as we do that the plaintiff sustained its allegation that the defendant had property which he concealed, the order discharging the attachment is reversed and the case remanded.

J. F. Patterson, for plaintiff in error.

Smith, Taft & Arter, for defendant in error.

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Summit County.

THE COUNTY DEPOSITORY ACT.

[Circuit Court of Summit County.]

THE STATE OF OHIO, EX REL ALEXANDER, v. L. H. OVIATT ET AL.*

Decided, October, 1906.

Situs of Corporations—Where Banks Having Branches in Different Counties are "Situated"—Constitutionality of the County Depositories Act—Mandamus—Injunction.

The county depository act is constitutional, and under its provisions only banks which have their situs in the county are eligible as bidders for the public funds of that county.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Appeal from the Court of Common Pleas of Summit County.

We have examined this case with care, and have read the opinion of Judge Wanamaker of the court of common pleas when the case was tried before him. We do not think we can improve upon that opinion, and we reach the conclusion reached by him. The same order will be made here as was made in the court below.

This disposes of the proceeding in mandamus brought against the county commissioners and treasurer. We think it is clear that the statute under which bids were received for the public moneys, confines the bidders to those banking corporations which have their *situs* in the county, and that the Cleveland Trust Company is situate, not in this county, though it has a bank here, but the corporation is located elsewhere.

Upon the opinion announced by Judge Wanamaker in the court of common pleas we pronounce the judgment that the injunction prayed for in the suit by Alexander be allowed, and the mandamus brought by the trust company be dismissed.

Slabaugh & Seiberling, for plaintiff.

H. M. Hagelbarger, for defendants.

*Affirming, *State, ex rel Alvin D. Alexander, v. L. H. Oviatt et al*, 4 N. P. —N. S., 481.

INJUNCTION AGAINST LEVY ON JUDGMENT.

[Circuit Court of Knox County.]

EDWIN W. HOWARD v. E. T. KINNEY COMPANY.

Decided, October 12, 1906.

*Cognovit Note—Judgment upon, in Defendant's Absence—Pleading—
Injunction Against Levy of Execution—Jurisdiction.*

In the absence of a showing of lack of jurisdiction to enter the judgment complained of, injunction will not lie to prevent the levy of execution on a foreign judgment.

BY THE COURT.

In this case the petition shows that judgment was rendered against the plaintiff in the Common Pleas Court of Fulton county on a cognovit note. The allegation that he did not have opportunity to appear and make a defense is not important, because the averment that it was rendered on a cognovit, implies that his appearance was there entered under the terms of that cognovit, and that being true he was in court to all intents and purposes, and if he has a defense to that action, that is the court in which he must make application for relief. It is only where a judgment is void for want of jurisdiction that an injunction will lie to restrain a levy of an execution issued upon that judgment. Finding and decree for defendant; petition of plaintiff dismissed at the costs of plaintiff. Remanded for execution. Motion for new trial overruled and exceptions noted.

Hugh Neal and L. B. Houck, for plaintiff in error.

F. V. Owen, for defendant in error.

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INDUCEMENT TO PEDESTRIANS TO WALK THROUGH A SWITCH YARD.

[Circuit Court of Cuyahoga County.]

BALTIMORE & OHIO RAILROAD COMPANY v. JOHN CAMPBELL.

Decided, October 29, 1906.

Negligence—Habitual Use of Tracks by Pedestrians—Liability of Company to One Struck by Locomotive—Running without Light or Warning on a Dark Night.

Where a railroad company maintains yards and switch-tracks along docks and near to a much traveled thoroughfare of a city, and persons have been in the habit for a long time of walking along these tracks and up to this thoroughfare to the knowledge and with the acquiescence of the company and without notice or warning to the contrary, a person who, while walking carefully along these tracks at a point near the thoroughfare on a dark night, is struck by a locomotive backing down upon him without warning, may recover from the company for his injuries thus sustained. *Harriman v. Railway*, 45 O. S., 11, followed.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

This was a personal injury damage case, with verdict and judgment for the plaintiff below. The petition alleges that:

“On the 24th day of November, 1903, the defendant was the owner of, and engaged in operating, a line of railway, extending to the village of Fairport, in the state of Ohio; that said line of railway, together with two or three side-tracks, extended along the easterly side of Grand river, and the space between Grand river and said tracks was taken up and occupied by docks, used chiefly for unloading ore from vessels and loading the same into cars on defendant's tracks; that at the point about opposite the center of said village of Fairport, a street called Third street, extending in a westerly direction, intersects said tracks at about right angles, and leading directly to the business portion of said ore docks; that there are no other streets nearby, leading to or from that portion of said ore docks, by reason of which said Third street was, and for many years had been, a very busy thoroughfare, used at all hours of the day and until late at night, by large numbers of men employed at said docks, and by the employes and officers of boats lying in said river; that a large part

of the men so employed on boats and on said docks, and many other persons having business in the neighborhood of said docks, were obliged to, and did for many years past, use and walk upon the tracks of the defendant from both directions to the point intersected by said Third street, which was the chief and principal outlet from said docks, leading to the center of said village.

“Plaintiff alleges that the tracks of the defendant had been used in the manner aforesaid, by persons going to and from their work at said docks, for more than ten years preceding said 24th day of November, 1903, and that the defendant acquiesced in and consented to the use of its tracks in the manner aforesaid and made no objections thereto.

“On said 24th day of November, 1903, plaintiff was an employe of the ‘Hartnell’ a vessel plying the waters of the Great Lakes, and then lying at said docks; that at about six o’clock in the evening of said day, he left his boat to go to the post-office, and entering upon the tracks of the defendant, walked in a northerly direction, toward the point of intersection of said Third street; that while thus walking, in a careful, safe and proper manner, between two of said tracks, along and upon a well-beaten path, suddenly and instantly, without any notice or warning to him whatsoever, and when he was at a point within one hundred and fifty feet from said Third street, a switching engine of the defendant, under the charge and control of its employes, silently backed down upon him from behind, and struck him upon the back, below the left shoulder, suddenly throwing him forward in such a manner that he fell with his left arm across the rail, so that the same was then and there run over by said locomotive, and so badly crushed and mangled that the same had to be immediately thereafter amputated near the shoulder.

“Plaintiff further says that said locomotive was without a headlight and that no signal of its approach was given by the ringing of its bell or otherwise; that had there been a headlight on the rear of said engine, its reflection would have given him notice and warning; and no headlight being thereon, he was deceived and misled and induced to believe that he was in safety, and that no train or locomotive was approaching.

“That said injuries were received in the manner aforesaid, without any fault on his part, but solely by and on account of the gross negligence of the defendant through its servants and agents in charge of said locomotive; that said negligence consisted chiefly in the failure of the servants of defendant in charge of said locomotive to carry a headlight, and in failing to give any signal or warning of the approach of said loco-

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tive; said servants and agents of defendant were also negligent in failing to see plaintiff before striking him, and in failing to stop said locomotive or slackening speed so as to avoid the injuries plaintiff complains of."

The bill of exceptions shows that such evidence was introduced to establish the allegations of the petition that the jury might well have found that the accident occurred in the manner and under the circumstances claimed in the petition. The night was dark; the plaintiff testified that as he proceeded along the beaten path between the tracks, he looked back frequently and listened, but saw and heard nothing until he was struck. Nobody saw him struck and the train crew did not know they had injured anybody until some time after the accident.

No prejudicial errors appear to have occurred on the trial. The sole question which has given us concern is whether, under the law, the plaintiff was entitled to recover at all.

His counsel rely upon two cases in this state, *Railroad Company v. Snyder*, 18 O. S., 399, and *Harriman v. Railway Company*, 45 O. S., 11.

Part of the syllabus of the Snyder case reads as follows:

"It is the duty of persons in charge of cars passing along streets or other frequented places to exercise great caution; and if, by failure to do so, a child of tender years is injured, the company represented is liable in an action by the child."

The first paragraph of the syllabus in the Harriman case reads:

"Where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care, having due regard to such probable use, and proportioned to the probable danger to persons so using its road."

Counsel for railroad company insists that the liability of the railroad company in the Snyder case grew out of its negligently running down a child on its tracks, after it saw the

child in a place of danger and could have stopped or warned the child off the track.

The true test in the Harriman case is claimed to be the negligent keeping on its premises, at a place where it knew the public was accustomed to go, of a thing dangerous in itself, to-wit, a torpedo, attractive to children, and which the plaintiff, by childish instincts, was led to explode.

It is said that the Baltimore & Ohio Railroad Company was operating its switch engine in its own yards, and in its usual and customary manner, on the night that Campbell was injured, and that, at best, Campbell was a mere licensee, without invitation or inducement, and that his permitted use of the track was subject to all risks incident to the ordinary use of the track by the company.

Our attention has been called to four cases later than the Harriman case in which it is claimed that the doctrine of that case is modified, but our examination of said cases leads us to believe that the Supreme Court has not departed from the rule stated by it in the Harriman case, so far as the same applies to duties of the company to the public upon its tracks at places known by it to be frequented by the public without objection by it.

The case of *Railroad Company v. Marsh*, 63 O. S., 236, was also a torpedo case, but the boy, Marsh, had been employed by the station agent without authority and without the knowledge of the company, to attend to switch lamps, and was on his way about that business when injured. The fourth paragraph of the syllabus reads:

“While a railroad company owes a duty to the public to keep its tracks free from unnecessary danger along where the public are allowed to use such tracks as a way for travel, one who is not using such tracks as such way can not be heard to complain of the breach of such duty, and in case of injury to him can not bring the breach of such duty to his aid in attempting to recover for an injury caused by reason of some other alleged negligence of the company.”

In the case of *Railroad Company v. Aller*, 64 O. S., 183, it appears that Aller departed from the path used by the public

and was so injured. Judge Shauck, in delivering the opinion (page 193), says of the Harriman case:

“The doctrine of the case is that when the company became aware that persons were using the road for purposes of their own, it became its duty, not to alter the construction of its road, but to operate it consistently with the facts thus known to it.”

The case of *Railway Company v. Workman*, 66 O. S., 509, involved the duties of the company toward one of its own employes, using a “speeder” upon the main track, “without any invitation or inducement therefor by the company, but with no objection on the part of the company.” Judge Davis, on page 541 of the opinion, says:

“The doctrine of *Harriman v. Railway Company*, 45 Ohio St., 11, does not apply here, because there is in this case no pretense of acquiescence in the *public* use of the railway track in the way in which it was used by the deceased, nor was there any invitation or inducement held out to the deceased to so use it.”

The case of *Railroad Company v. Kinz*, 68 O. S., 210, cites the Harriman case, and suggests that that decision was bottomed upon the sound principle that the railroad company maintained an attractive and dangerous thing upon its premises. It does not suggest that the first paragraph of the syllabus of the Harriman case, which has been heretofore quoted, is not good law, but shows that the law as so stated is not applicable to the facts in the Kinz case.

Finally, no Ohio case has been cited to us which holds a doctrine contrary to that quoted from the Harriman case. The only suggestion of counsel has been that the ruling was not necessary to a decision of said case and that the Supreme Court has found it inapplicable to the facts of the other cases cited.

Nor do we believe that the facts of this case show that Campbell was upon the path between the tracks as a mere licensee, without invitation or inducement. To use the language on page 243 of the Marsh case, his being upon the path between the tracks at the time was induced by the fact that said path had been used for years as a line of travel by the public.

The company must be held to care commensurate with this inducement, so long as it permits the same to continue, without signs or other warning to keep the public off. To back down upon said path and upon a person walking carefully thereon, in the night season, without warning, as the jury found in this case, is actionable negligence.

Judgment affirmed.

Kline, Tolles & Goff, for plaintiff in error.

W. H. Boyd and McGrath & Stern, for defendant in error.

REVIEW OF PROCEEDINGS UNDER THE JONES LAW.

[Circuit Court of Franklin County.]

IN THE REHEARING OF A PETITION ON FILE UNDER WHAT IS KNOWN AS THE JONES LOCAL OPTION LAW.

Decided, October, 1906.

Liquor Laws—Proceedings in Error—Proper Title—For Review in Circuit Court—Under the Jones Local Option Law—Granting Leave to File Petition in Error in Chambers—Uncertain Features of the Law.

1. Where a review is desired of proceedings under the Jones local option law (98 O. L., 68), the qualified elector who feels aggrieved should appear as plaintiff and the mayor of the municipality in question as the defendant in error.
2. Inasmuch as no express authority is given the judges of the circuit court in this statute or in any statute to grant leave to file a petition in error in vacation at chambers, a petition filed at such a time and by such leave must be stricken from the files.
3. Whether the provisions for review under this statute are defective and void for uncertainty, and what effect that would have upon the law itself—*Quære?*

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

In these cases it is sought to obtain a review in this court of the proceedings before the officers with whom the petitions were filed, and by whom the order was made in pursuance to the provisions of the act popularly known as the Jones Local Option

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Law, 98 O. L., 68. The provisions for review are found in Section 12 of that act. It is therein provided that:

“Any person being a qualified elector of any residence district of any municipal corporation, wherein a petition shall have been presented and held sufficient by a mayor or judge as provided for in this act, may prosecute error from such finding by first filing a motion for leave to file a petition in error with the circuit court of the county in which such residence district is situated. The motion shall not be granted unless for good cause shown. If such motion is granted, a petition in error shall be filed within fifteen days after the finding or decision of the mayor or judge, setting forth the errors complained of. The circuit court, upon the filing of such petition, shall forthwith issue a summons addressed to the mayor of such municipal corporation, notifying him of the filing of the petition in error and directing him to appear in said court on behalf of said residence district at the time mentioned in the summons, which time shall not be more than thirty days after the finding or decision of the mayor or judge, nor less than ten days after the filing of such petition. The circuit court shall have final jurisdiction to hear and determine the merits of the proceedings, and there shall be no appeal or error proceedings allowed from such decision.”

The cases are all submitted upon the question as to whether they are properly in court, and for a determination of the character of the proceedings here, if the petitions in error are found to be properly filed.

As preliminary to the conclusion we have evolved out of the obscurity of the statute, it may be said that the proceedings are not properly entitled in this court. The qualified elector who feels aggrieved should appear as the plaintiff in error, and the mayor of the municipality in question as the defendant in error.

In each of the cases the leave to file the petition in error was granted by two of the judges of the circuit court sitting at chambers. The Circuit Court of Franklin County was in vacation at the time, and no term of the court was to be holden until long after the expiration of the fifteen days in which the petition in error must be filed. Did the judges of the court have power at chambers to grant the leave to file the petition in error? The Constitution provides, “The judges of the Supreme Court, of the common pleas and such other courts as may be created, shall

respectively have and exercise such power and jurisdiction at chambers or otherwise, as may be directed by law." Constitution of Ohio, Article IV, Section 18.

"The general doctrine is that all judicial business must be transacted in court, whether there be any express direction to that effect or not; and that such business as may be transacted out of court is exceptional and must find express authority in statute." 4 Enc. Pleadings & Practice, 337, and authorities there cited.

"It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no order in vacation except such as are expressly authorized by statute." *Blair v. Reading et al*, 99 Ill., 600.

No express authority is given the judges in the statute in question, or in any statute, to grant the leave to file the petition in error in vacation at chambers. The petitions in error were, therefore, filed without authority of law and will be stricken from the files.

The other questions raised must be reserved until a proceeding in error has been properly instituted. The question whether the provisions for review are defective and void for uncertainty, and what effect that would have upon the law itself must await such a proceeding.

The existence of the jurisdictional facts which must underlie the order to give it vitality and validity, may be challenged in another forum.

Addison & Addison, Gumble & Gumble and C. C. Williams, for plaintiff in error.

Wayne B. Wheeler, for defendant in error.

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Lucas County.

EMPTYING SEWER IN STREAM ON PRIVATE LAND.

[Circuit Court of Lucas County.]

ALICE M. WHITNEY ET AL V. THE CITY OF TOLEDO ET AL.

Decided, October 18, 1906.

Sewers—Construction of, in Road as a Drain for Surface Water—Pollution of Stream on Private Land—Power of Public Authorities—Rights of Injured Private Owner—Appropriation—Injunction—Costs.

1. The use of a public road for the purpose of carrying a sewer beyond the limits of a municipality to a suitable point for discharging its contents into a water course, can not be interfered with by an adjacent property owner, where the use of the sewer is restricted to surface or storm water, and its construction has been duly authorized by the city council with the approval of the state board of health and the county commissioners.
2. But the use of such a sewer for sewage purposes, even in a slight degree, would be in derogation of the rights of an abutting land owner whose property would be traversed by the stream into which the sewer empties; and unless the right has been acquired by appropriation, such use may be enjoined by a land owner thus situated without waiting until the threatened injury has resulted in material damage.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

Sewer district No. 27 of the city of Toledo is located upon the west part of the city. A main or front sewer has been projected by the city, extending through said district, for a distance of something over a mile along certain streets and alleys, coming out upon Monroe street, within a few hundred feet of Ottawa creek; thence traversing Monroe street to the creek where it is designed to empty. Breymann & O'Neill are the contractors who are to build this sewer.

Within about 150 feet, or thereabouts, of where the sewer empties, it crosses the city line, and for the remainder of the distance, traverses or continues on Monroe street, which is known, I believe, as the Monroe road outside of the boundaries of the municipality.

The plaintiffs own a tract of eighty acres of land, joining the west line of the city, lying upon both sides of the Monroe road at this point, and upon both sides of Ottawa river, sometimes called Ten Mile creek.

This is to be a covered sewer of brick construction. For the distance between the city line and the mouth of the sewer, the sewer will be upon the northerly side of the road.

Plaintiff's land is used and occupied for farming, grazing and dairy purposes. The cattle upon the place—and the same is true of adjoining tracts of land—are used to frequent this creek and drink from its waters; and the waters at this point appear to us to be fit for such use. The evidence tends to show that there are sewers emptying into the creek lower down; but none so far up the creek as this proposed sewer.

Plaintiffs seek to enjoin the construction of this sewer, on the ground that its use will pollute the waters of the stream; and upon the further ground that even if they do not so pollute the waters of the stream, this use of the highway is unauthorized and may not be made, unless the right to thus use it shall have been acquired by appropriation proceedings.

There seems to us to be no question but that the city had a right to construct the sewer and to carry it beyond the city limits. But this, of course, leaves unsettled the right of the city as against the private rights of the proprietors of these lands. In other words, the city had the authority to thus proceed, provided it acquires the rights of private proprietors; and it seems to us clear, from the evidence, that the sewer is needed; that it is a public necessity; that the board of health of the state has authorized its construction, and the emptying of it into this creek at this point; and that the county commissioners, in so far as they have authority over the public road, outside of the city limits, have also consented to that use of the public road.

But in so far as the construction of the sewer may infringe upon the private rights of the plaintiffs, of course, the authority exercised by the council, or received from the state board of health, or from the county commissioners, can not affect such private right.

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Now, it appears to us, from the evidence, that though this is designed for storm water, or surface water and sewage as well, in all probability it will be some time before the sewage emptying into this sewer will be of a quantity to materially affect, injuriously, the water in the creek; and yet, should it affect it injuriously to any extent, we think that to that extent the plaintiffs have the right to complain, and to that extent it would be laying an additional burden upon the plaintiffs' land, in addition to that of the public easement in the road for road purposes.

The rights of the contractors here can rise no higher than those of the city. But we are of the opinion that the rights of the city, and of the contractors as well, to construct the sewer and to use it for the drainage of surface or storm water are clear, under the law. Not so, however, of the right to use it for sewage purposes.

Without expressing any opinion as to what the public authorities might do in the way of using a public thoroughfare or highway, or the channel of a stream for the location of a sewer to carry water away from private land, we think that the right to so use the same for the purpose of draining roads, streets, highways and the adjacent territory necessary to the preservation or improvement of the public highways, is entirely clear under the law; and that this right, in this instance, extends, not only to the drainage of the Monroe road and Monroe street, but to the drainage of other roads and streets in that locality, that may be drained through and over Monroe street and the Monroe road.

Though the proprietors of these lands, who originally dedicated the part which is now called the Monroe road, may not have actually contemplated the filling up of this adjacent territory with houses and dwellings by the growth of the city, yet we think, in law, that they must be held to have contemplated that, and that no matter how extensive or how numerous the streets, roads and highways laid out in that vicinity, either within the corporate limits or outside the corporate limits, the part of this territory in question known as the Monroe road, lying between the city limits and the creek, has become sub-

servient to the right and easement of the public in the drainage of all such public ways. And in so far as this sewer may be designed for such use, we think it is an entirely lawful use of the highway.

It does not appear to us, from the testimony, that there will be in the construction of this sewer any injury to the plaintiff's premises in the way of hindering the access thereto, or in any other way. It seems that the construction will be rather an improvement than otherwise. Nor does it appear that by the casting of additional fresh water upon the premises at the outlet of this sewer, there will be any injury to the plaintiff's premises. Indeed, it is not claimed that it would be by the plaintiffs or their counsel. That would be rather a benefit than otherwise. The creek at this point in dry seasons becomes nearly dry; at some times the current of the stream stops entirely; and an additional flow of fresh water, and pure water would be a benefit to the plaintiff's premises than otherwise, so that so long as it is used as a drain for surface water or clear water, or such water as naturally flows from the streets and highways (which, of course, is not entirely pure water, but water of an entirely different character from sewage), we think it may be lawfully so used.

But we are of the opinion that it may not be lawfully used for sewage purposes until the right to so use it has been acquired by appropriation proceedings, and that the emptying of sewage should be forbidden without waiting for any *material* damage to the plaintiff's premises. It would be impracticable, and we think an infringement on the plaintiff's rights, to require them to submit to the use of this sewer for sewage purposes in ever so small a degree, until the right to thus use it had been acquired. Under the nineteenth section of the Bill of Rights, we think that such use of the plaintiff's premises in ever so small a degree would be a taking of their property, and this taking may not be done until the right is first acquired and paid for.

The decree of the court will be that the petition will be dismissed as to the contractors, Breymann & O'Neill. They will be permitted to construct this sewer. The city will be permitted

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to use it for the drainage of the streets and highways which it traverses and the streets and highways within the district. But the city will not be permitted to connect any private residences to this sewer, or any bulidings, or any places that would empty sewage into it until it has acquired the right by appropriation proceedings.

We think that the plaintiffs have not proceeded prematurely here; but that they were quite right in proceeding to enjoin this *threatened* injury of their premises; and it is apparent from the attitude of the city here that the city was going ahead to make this, that we regard as an unlawful use of the premises, without first appropriating the right therefor. The costs of the proceeding will be adjudged against the city.

No costs will be adjudged against Breymann & O'Neill. The whole costs will be adjudged against the city. There have been no costs of any consequence made by adding the contractors as parties, and we think for the sake of conformity they should have been and were properly made parties defendants.

E. M. Beard, for plaintiffs.

George N. Fell, for the City of Toledo.

W. H. McClellan, for Breymann & O'Neill.

SCIENTER IN BEAL LAW PROSECUTIONS.

[Circuit Court of Cuyahoga County.]

MINNIE PAGE V. THE STATE OF OHIO.

Decided, October 29, 1906.

Liquor Laws—Prosecution Under Beal Law—Averment of Scienter—Bills of Exceptions—Deficient as to Testimony of One Witness—But Containing "Substantial" Points of Testimony.

1. An affidavit charging a person with a violation of the Beal law (Revised Statutes, 4364-20), in that he kept a place where intoxicating liquors were sold, purchased or given away, need not aver that such place was "knowingly" kept.
2. A bill of exceptions certifying that it contains all of the evidence except that presented on one day of the trial, and all the "substantial" points presented on that day, may not be reviewed as to the weight of the evidence.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

This is a proceeding in error, brought to reverse a judgment of the common pleas court, affirming a conviction of plaintiff in error, before a police justice, on an affidavit charging her with keeping a place where intoxicating liquors were sold, purchased and given away, contrary to the provisions of the Beal law.

It is said that the affidavit is defective in that it does not state that the accused "knowingly" kept said place.

We hold that an averment of scienter is not necessary in an affidavit or indictment charging violation of the Beal law, so-called.

A full consideration of the authorities on this subject will be found in the case of *State v. Fromer*, 7 N. P., 172, decided by Judge Wildman, then Common Pleas Judge of Huron county, now one of the judges of the Circuit Court of Ohio, Sixth Circuit.

It is also said that the judgment is not sustained by the evidence, but this proposition we are unable to review, for the bill of exceptions does not contain all the evidence. This is no fault of counsel for plaintiff in error. It appears that trial was begun on August 3, 1906, the accused having no counsel present. After some evidence had been offered, the trial was adjourned to August 10, with consent of defendant. On the last named day the defendant was present with her counsel, who made an effort to bring out all the evidence that had been offered at the previous hearing, by a re-examination of the only witness who had then testified; at the conclusion of this effort, the court said:

"You have substantially proved everything that he testified to before in this case in chief; may not be in the exact language, but the substantial points of that evidence you have in."

The certificate to the bill of exceptions recites:

"This bill of exceptions contains all of the substantial points of the testimony of the witness, F. P. Merrill, taken on August 3, 1906, and all of the evidence offered by either party on August 10, 1906, in the trial of this cause."

We are compelled to say that the certificate does not authorize us to weigh the evidence contained in the bill of exceptions pre-

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sented to us. It is not sufficient that we have before us what the trial judge considers all the "substantial points of the testimony," but we should have all the evidence. The reviewing court might not agree with the trial judge as to what were the real substantial points of the testimony. The certificate in this case substitutes the judgment of the trial judge on that point for the judgment of this court, leaving us unable to pass upon the weight of the evidence with any satisfaction to ourselves or certainty of arriving at a correct conclusion.

The plaintiff in error was content to rest this matter in the judgment of the trial judge and there it must remain and the judgment must be affirmed.

D. M. Bader, for plaintiff in error.

A. V. Taylor, for defendant in error.

**RECOVERY FOR SERVICES TO HAVE BEEN GIVEN IN
PAYMENT FOR REAL ESTATE.**

[Circuit Court of Knox County.]

MARTIN J. MURPHY V. DANIEL F. ADAMS, ADMINISTRATOR.

Decided, October 12, 1906.

Contract for Sale of Real Estate—Not in Writing—Services to be Credited on Purchase Price—Contract Abandoned—Action for Value of the Services.

A contract for the performance of services, a part of the agreed value thereof to be credited on the purchase price of real estate thereafter to be conveyed, although for the sale of real estate and not in writing, furnishes a basis for the value of the services rendered, provided the party agreeing to perform the work did not abandon it or fail to go forward with it through his own fault.

By THE COURT.

The record in this case discloses that the work performed by defendant in error's intestate was performed by him under and in pursuance of a contract, by the terms of which he was to receive a credit of one dollar per day upon the purchase price

of a certain dwelling-house then to be erected by the plaintiff in error for said defendant in error's intestate, and which was to be sold and conveyed to him for the sum of \$1,050. This contract was verbal, and by reason of the statute requiring a contract for the sale of real estate to be in writing, could not be enforced in the courts of this state. But, notwithstanding that fact, this court is clearly of the opinion that if the plaintiff in error abandoned that contract and refused to go forward with the same, the defendant in error could recover for the estate he represents, the value of the services rendered by his intestate in pursuance of that contract; but if, on the other hand, the defendant in error's intestate failed and refused to go forward with that work and abandoned the same through his own fault and of his own motion, then we do not think he could recover. There is practically no evidence in this record disclosing which of these parties repudiated the contract. The evidence is sufficient as to the services and the value thereof, but it is not sufficient to sustain this verdict upon the theory that the plaintiff in error abandoned the contract, and for that reason and that reason only, it is against the manifest weight of the evidence and is not sustained thereby, and the case is reversed and remanded for a new trial.

Exceptions of defendant in error noted.

L. B. Houck and *W. N. Koons*, for plaintiff in error.

C. V. Trott and *W. A. Hosack*, for defendant in error.

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Jackson County.

**IMPLIED REVOCATION AS TO AFTERWARD ACQUIRED
PROPERTY DEVISED BY WILL.**

[Circuit Court of Jackson County.]

M. T. RIDENOUR V. MARY E. CALLAHAN ET AL.

Decided, June 7, 1906.

*Wills—When a Will Speaks—Implied Revocation—Revocation Pro
Tanto—The Wills Act—Sections 5956 and 5957—Pleading—Par-
tition.*

1. The doctrine of implied revocation that existed at common law prior to the English Wills Act of 1837, does not obtain in Ohio as to after-acquired property devised by will; or to devised specific property conveyed by a testator after the execution of the will and reconveyed to him before his death.
2. Where R made a will in 1900, devising specific real estate, and thereafter conveyed such real estate to another, and later and before the death of R the same was reconveyed to the testatrix, said devise passes under the original will and is not revoked.
3. Under the facts stated in the second proposition of the syllabus, said will is construed, as to such devise, to speak from the death of the testatrix.

JONES, J. (orally): WALTERS, J., concurs; CHERRINGTON, J., dissents.

This was an action in partition begun in the court of common pleas of this county.

Several of the defendants filed demurrers, alleging that the petition did not state a cause of action; the court of common pleas sustained the demurrers, and proceedings in error have been instituted in this court to reverse the judgment of the court of common pleas.

The petition in the case is filed by one of the children of Eliza B. Ridenour asking for partition. He has made parties defendant in the case, the heirs of Eliza B. Ridenour, together with the guardian of one of the imbecile children, and the administrator with the will annexed of Eliza B. Ridenour, who is also a son of the testatrix.

The plaintiff sets forth the various interests of these heirs or children, of whom there were five, and claims that he has a one-fifth interest as tenant in common in the two tracts of land described in the petition. The petition alleges that on November 20, 1900, Eliza B. Ridenour, the testatrix, being then seized of the real estate described, executed a will, in which she provided that her imbecile child, Charles E., was to have a home and care, etc., and that her daughter, Mary, was to furnish this home, care and provision for her imbecile brother, and for that she was to have the property described in the petition for life. If Charles survived Mary, the plaintiff in error here, who is one of the testatrix' children, was to look after Charles' welfare.

Upon the death of both Charles and Mary, all the balance of the property remaining unconsumed was devised to her other three children, M. T. Ridenour, James Ridenour and W. D. Ridenour.

On June 3, 1904, the testatrix executed a deed to Mary E. Callahan, her daughter, for the first tract named in the petition, which I will call the "Bridge street" property. This deed was executed for the nominal consideration of one dollar, and the further consideration of the care of herself and Charles for their respective lives, and to pay their funeral expenses, taxes, and certain other debts that she mentioned in the deed.

And on the same day she also executed a deed to one of her sons, James S. Ridenour, for the second tract, or the farm property, for the nominal consideration of one dollar, and love and affection, and to make him even with the balance of the children; she, however, reserving to herself for life the profits out of this farm property after the payment of repairs and taxes thereon.

The petition further alleges that on June 25, 1904, for the purpose of having all of this property equally divided among them, that all the children except the imbecile, entered into a written agreement that these two tracts of property should be reconveyed to the testatrix, and that the expenses for the care of the mother, the testatrix, and of Charles, the imbecile, and William D., should be borne equally by all of the five children.

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The petition alleges that while the testatrix was a party to the written agreement she did not sign it.

The property thereupon was reconveyed by the two children, Mary and James S., and the petition alleges the testatrix accepted this conveyance in pursuance of the agreement. On September 27, 1904, the testatrix died.

The contention in this case, which counsel upon both sides have presented, is this: After a testator has devised specific property to another, and between the date of the execution of the will and the time of the testator's death has conveyed the specific property, and later has had the property reconveyed to him, whether the aforesaid devise will pass the property under the original will, or whether by reason of that conveyance by the testator there has been an implied revocation of the will as to that property.

It will be observed that the will was executed in November, 1900. She made the deeds to the property in 1904, and before her death on September 27, 1904, the property that she so deeded after the execution of her will, was reconveyed to the testatrix.

Under the old English law, at least prior to July 3, 1837, when the Wills Statute was passed, there was no question but that if, after the execution of a will by a testator, he devised any of that property, a conveyance would abrogate the will *pro tanto* so far as that property was concerned, and a reconveyance would not re-invest him with the property so he could devise it by will unless he would change the will.

The question is whether that applies now—whether the doctrine of implied revocation, as it existed prior to 1837, exists at this date in Ohio.

Now, in Ohio, a will can not be revoked orally. We have a statute which provides for the manner in which a will can be revoked, and it can only be revoked in the manner provided by Section 5953, and that is by the testator tearing, canceling, obliterating or destroying the same, or by a new will or codicil executed in writing under the same solemnities as the old will.

So under that section, that is the only method of revoking a will in this state, except it may still be revoked under the doctrine of implied revocation.

The latter part of Section 5953 provides, in reference to the method in which wills may be revoked, as follows: "But nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator."

So that we still have in Ohio the doctrine of implied revocation.

Then the question is, has this will been revoked *pro tanto* as to this property by a conveyance thereof by the testatrix during her lifetime?

There is no question but that at the time the case of *Brush v. Brush* was decided in the 11 O., page 287, this would have been an implied revocation, and since our present will statutes in Ohio were not in force in 1842, when that case was decided, that the testatrix would not be re-invested with the property so as to make this property pass under the will.

The position of plaintiff in error perhaps is better stated in Page on Wills, Section 278, and counsel can see why, in the early years of the English laws, the doctrine of implied revocation applied with so much strictness as it did then. But prior to 1837, as I have stated, the will took effect at the date of its execution, and if a testator during that time devised property, no after-acquired property, whether such was the same property or other property, would pass by that will. It was only property that he had possession of at the date of the execution of the will and of which he had continuous seizin at the time of his death that passed under the will at that period.

"This rule at common law rested upon the principle that testator by a devise of his property could dispose only of the real property then owned by him; while after-acquired property could not be devised, but passed to the heirs. As we have seen, this was the result of the common law theories of seizin. Hence, if testator after making his will altered his estate in such a way as to divest himself of the seizin, even for a short time, his new estate in the property was looked upon as an after-acquired estate, and could not pass by will. To make a valid devise, testator had to be seized at his death of the same estate that he was seized of at the date of the will." Page on Wills, Section 278,

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Now then, the doctrine of implied revocation of the will did obtain on that day. What does it mean? Some of the authorities call it "implied revocation"; others "presumed revocation." That is, there is merely a presumed revocation, because if after the time the will took effect, the property were conveyed, it would leave nothing for the will to operate upon. It was not a revocation arising from any expressed intention of the testator, but was a revocation arising under the legal maxim, "*Ex necessitate rei.*"

But how has it been since the enactment of the Victorian Statute on July 3, 1837, which are substantially in force in nearly all the American states?

Section 23 of the English Wills act referred to, similar in effect to Section 5956, reads as follows:

"And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of it by will *at the time of his death.*"

Then it changes the old common law as to when the will shall speak in the next Section 24:

"Be it further enacted, That every will shall be construed, with reference to the real estate comprised in it, to speak and take effect as if it had been executed *immediately before the death of the testator*, unless a contrary intention shall appear by the will."

Now that is the doctrine in Ohio, and in fact found substantially in Section 5969 of the Revised Statutes, but not in the exact language of Section 24 of the Victorian Statutes.

Section 5969 provides that "property acquired by the testator after the making of his will, shall pass thereby, in like manner, as if held or possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator."

This section means nothing more or less than the will must be construed to speak from the death of the testator, for the statute here passes property acquired after the will's execution.

Now, in determining whether or not the old doctrine (the common law doctrine of implied revocation of the will) applies to the facts in this case, we must take into consideration these two sections of the statutes of Ohio. The main question is: What is the law of Ohio as to when a will speaks? But before I come to that, I want to refer to the reason why the old rule was changed, and I will read very briefly from various authorities.

Page on Wills, 279, refers to the old doctrine:

“The subject of revocation by alteration of estate is practically obsolete at modern law. Nearly all the jurisdictions in which common law is in force have passed statutes to the effect that no alteration in the estate of testator in property devised or bequeathed shall effect a revocation of his will as to such, unless he is wholly divested of his interest therein, or unless in the instrument by which such alteration is made he declares his intention that it shall operate as a revocation of such previous devise.”

2 Woerner on the American Law of Administration, Section 886, page 966 (bottom paging):

“Under a technical rule of the common law, no real estate could pass by a will of which the testator was not the owner at the time of its execution. This rule has been severely criticised, as calculated to mislead and defeat the intention of testators, and is now abolished by statute in England, as well as in most, if not all, of the states of the Union, providing, substantially, that wills shall be construed, in respect of both real and personal estate, as if executed immediately before the testator's death, or directing real estate acquired by the testator after the date of the will to pass thereby, if such appear to have been intended.”

And the authorities cited embrace Ohio as one of the American states which has provided for such a statute, and that section is 5969.

Beach on Wills perhaps has a better statement of this doctrine than any of the authorities cited.

Section 67 of Beach on Wills (the Pony Edition) is as follows:

“Under the old law it was essential to the validity of a devise of freehold lands that the testator should be seized thereof at

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the making of the will, and that he should continue so seized without interruption until his decease. If, therefore, a testator, subsequently to his will, by deed aliened lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void. And the devise of a freehold lease, which was renewed by the testator after making his will, could not take effect under it."

Why? Because a devise made after the execution of the will must have reference to property only that he was seized of at the date of his will, and if he acquired property under this rule after that, the devise would not pass, for the reason he did not have it at the date of the execution. The same authority goes on to say:

"But the revocation of devises by an alteration of estate, is placed on an entirely new footing by the statute of 1 Victoria, ch. 26, which provides:

"No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances; and that no conveyance of real or personal property previously devised, shall act as a revocation as to the estate or interest therein, which the testator may have the right to dispose of by will at the time of his death.' In several of the united American states, similar statutes are to be found, providing in substance that no conveyance or alteration of estate which does not wholly divest the testator of all interest in the property mentioned in the will, shall prevent the operation of the instrument with respect to that which the testator may have power to dispose of at the time of his death. Such provisions are contained in the statutes of the Virginias, Kentucky, Ohio," etc.

So, also, is to the same effect, 1 Jarman on Wills, Sections 147-162.

We can very easily see how and why these various text-books seem to differ, for the reason that under the old law only such real estate passed as the testator had when he *executed* the will.

Now under our Wills act, whatever real estate the testator has, whether at the execution of his will or at his death, whether such be after-acquired property, or, as in this case, property he had conveyed, and later became re-invested with as after-

acquired property, since the will speaks from the date of the testator's death, such property passes thereunder, and that is the reason why the old rule has been modified.

In the 30th Volume of the American & English Encyclopedia of Law (2d Edition), page 654, that reason is set forth:

“It was formerly essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease. If, therefore, the testator aliened lands which he had previously devised, but afterwards acquired a new freehold estate in the lands, such newly acquired estate did not pass by the devise, which was necessarily void.”

The text plants the proposition upon the fact that it was necessarily so because he had to be invested with the title at the time of the will. Then the author says:

“By virtue of statutes, however, which now exist generally and which provide in substance that a will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears therein, *a conveyance by the testator of land which has been devised by him does not revoke such devise if subsequently, and before his death, the title to the land conveyed reverts in him.*”

It cites a number of authorities, and one of them is the case of *Woolery v. Woolery*, 48 Ind., 523, where Jarman on Wills (star paging), 147, states the case as follows:

“It was held in Indiana where real estate was owned by the testator at the time of making the will, and was some years later, conveyed by the testator, and one year after such conveyance by him, reconveyed to the testator, that the will was not therefore revoked by implication, but that its operation was restored as to this real estate.”

Beach, also, on pages 152 and 155, distinguishes and applies the doctrine to the laws as they now exist and as they existed prior to the enactment of the Victorian Statute:

“The corresponding English statute regulating this matter enacts that every will ‘shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the

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testator, unless a contrary intention shall appear by the will.' The effect of this statute and of those of the American statutes which follows its phrasology, is to raise the presumption of an intention to pass the after-acquired estate, unless the contrary be shown, throwing the burden of proving the contrary upon the heirs."

And, on page 155, the author says:

"At common law, a specific bequest was supposed to refer to the property answering the description at the date of the will. Hence, subsequent changes in property so given operated as an ademption thereof. But under the modern statutes by which wills are construed as to the real and personal estate, to speak from the death of the testator, a bequest of a leasehold is not adeemed by the expiration and renewal of the lease; and a subsequently acquired fee in the same property, although described as held for a term of years, passes under the bequest."

The reason for the rule is given as I have stated—that it depends entirely upon when the will speaks.

The 13th American & English Encyclopedia of Law (First Edition), pages 101 and 102 and the note thereunder, I think, treats briefly and well the question I am now discussing, and much better than the second edition does.

The text is as follows:

"Where a testator in his lifetime makes a conveyance of land specifically devised, the devise is thereby adeemed or revoked. If the whole estate is conveyed, the ademption is complete; if only part, the devise may still take effect on the residue. At common law, a devise so adeemed was not revived by reconveyance; whether statutes providing that the will shall speak from the testator's death would in themselves have that effect is, at least, doubtful; but under such act taken in connection with acts providing that no alteration of estate shall work a revocation, the lands reconveyed pass under the original description."

And here it cites in the note, among others, *Brown v. Brown*, 16 Barb. (N. Y.), 569, where it held that lands reconveyed were held to pass under the original description.

We have not before us the New York or Indiana wills statutes, but I assume they are substantially very similar to the Victorian Statute as those of Ohio are.

Reading the statutes of Ohio in that connection here (and when these statutes—5956 and 5957—speak of alteration or inconsistencies they refer to such alteration or inconsistencies in an instrument or conveyances that may exist at the death of the testator, not as at common law as they may exist at the time of the execution of the will; and “at the death of the testator” might be read into these statutes for the purpose of this construction), we have the application of the foregoing text.

Section 5956 provides that:

“A conveyance, settlement, deed or other act of the testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs.”

“Shall pass”—when? At the time of the death of the testator.

In other words, under this statute, all that the jurist must necessarily do is to take the conveyance that is outstanding and say whether *at that time* (the testator's death) there is an alteration of the estate.

And the next section provides for revocation in certain contingencies when the instrument shall be inconsistent with the devise in the will.

When inconsistent? At some time before the will takes effect? That would be *reductio ad absurdum*.

Reading this section:

“But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.”

There is no instrument in this case by which it can be compared. It has lost its vitality. The estate provided therein has gone back to the testatrix, and this statute must be construed so that this inconsistency be shown at the time the will speaks.

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Section 5969 provides that after-acquired estate shall pass under the will as if held at the time of its execution.

In other words, it provides that the will speaks from the date of the testator's death.

These will statutes of Ohio entirely change the law of implied revocation of devises as it existed prior to 1837.

Think of it! If the law prior to 1837 should obtain to-day and the testator should make a will, and between that time and his death he should deed a portion of his property to some person for a period of forty-nine years, it would be impossible for the testator to obtain a reconveyance of that property to pass it under the description of the will.

He would have to make a new will to govern; one would have to make a new will every time he acquired property that he had previously owned and devised.

That isn't the intention, we think, of these will statutes as they have existed from 1837 up to the present time.

It seems to us that there can be no doubt that the revocation that is complained of by counsel for the plaintiff in error does not apply to a case of this kind.

A *quacre* might arise whether, on the pleadings, the judgment should not be affirmed for the reason that the plaintiff's amended petition does not definitely state that the testatrix was *seized* of the real estate in question *when the will was executed*.

As the main question is a new one and of considerable importance in this state, and was also argued very fully by counsel, we have deemed it best to decide the case on the lines stated.

The result of the judgment will be that the judgment will have to be affirmed and the cause remanded.

Exceptions will be noted in behalf of plaintiff in error.

J. O. Yates, for plaintiff in error.

E. C. Powell, for Mary Callahan and Mary Callahan, guardian.

S. F. White and *R. L. Grimes*, for J. S. Ridenour, administrator with the will annexed of Eliza B. Ridenour, deceased.

John Harper, for Frank Ridenour.

**SHOOTING AN ARRESTING OFFICER ARMED WITH A
WARRANT OF DOUBTFUL LEGALITY.**

[Circuit Court of Knox County.]

FRANK E. COILE, ALIAS FRANK E. HILDRETH, v. THE STATE OF
OHIO.

Decided, October 12, 1906.

Criminal Law—Homicide—Arresting Officer Killed by Accused—Shooting Premeditated—Defense of Illegality of Warrant—Charge of Court—Weight of Evidence.

In a prosecution for the killing of an arresting officer, and the accused who killed such officer in resisting arrest interposes the defense that the warrant for the arrest was illegal, the consideration which should be given to such a defense depends upon the circumstances surrounding both the officer and the accused at the time of the homicide; and where the killing had been premeditated by the accused for some hours, and the officer was fully advised as to the crime, the same being a felony, and would have been authorized in making the arrest without a warrant, the question of the legality of the warrant under which the arrest was made is of no importance and does not excuse the willful and premeditated killing of the officer.

BY THE COURT.

This proceeding in error is brought to reverse a judgment of conviction of plaintiff in error for manslaughter, rendered in a cause wherein the state prosecuted said plaintiff in error upon an indictment charging murder in the first degree. The plaintiff in error claims that the verdict of the jury is against the weight of the evidence in one particular only, and waives all other question touching said assignments of error as to the weight of the evidence; that is to say, that the evidence fails to show beyond all reasonable doubt that plaintiff in error shot deceased.

Without attempting to recite any evidence in this record, it is sufficient to say that, to the mind of this court, the evidence offered by the state was overwhelming upon this proposition. True, a captious doubt might be raised upon the theory advanced by counsel for plaintiff in error, that the bullet found in the

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body of the victim did not correspond in every detail with the other bullets found in the possession of the defendant; but there are many reasons why this should not now correspond with such bullets, and there is no reason whatever why he should not have had a different one than any of the others found in his possession. The evidence, to our mind, is overwhelming upon this point, and shows conclusively to us beyond all reasonable doubt that plaintiff in error shot James C. Shellenbarger, and the verdict is, therefore, sustained by sufficient evidence.

The only other question raised in this case is as to the charge of the court touching the legality of the warrant issued by the mayor to Sheriff Shellenbarger. We think that all the questions raised touching the legality of this warrant are of little or no importance now, because the plaintiff in error was only convicted of manslaughter. If he had been convicted of murder in the first degree, perhaps the legality of the warrant might become of serious importance, but this record shows the fact that this plaintiff in error armed himself to resist any arrest, and for nearly a whole day premeditated the killing of any officer armed with any warrant that might come to arrest him, and the theory that he at the time doubted the legality of this warrant and for that reason offered resistance is not credible. We think that plaintiff in error did not testify to the truth in that behalf, and that his testimony touching that question is contradicted by every other circumstance in the case as well as by his own evidence touching his conduct on that day.

Upon the question of civil liability of an officer for false imprisonment, the legality of the warrant is of prime importance, but as a defense to the killing of an officer acting in good faith and armed with what upon its face appears to be a legal warrant, although in fact it proves to be defective in some particular, or even void, may or may not become important owing to the circumstances of the case. Under no circumstances could the party threatened with arrest upon such a warrant, do more than offer force commensurate with the danger threatened, and if he knows that the officer is the sheriff of a county and acting in that capacity, the mere fact that he will arrest him and hold him without inflicting any personal violence, will not

authorize his using a deadly weapon upon such officer. The arrest, under such circumstances, becomes a mere detention, and while it may be unlawful it is not such an invasion of his rights, or such an offer of personal violence, as would justify him in using a lethal weapon. But suppose the contention of counsel for plaintiff in error is correct, yet the facts and circumstances of this case show that before any personal violence of any kind or character was offered, this man, who had already armed himself and threatened to kill *any* officer coming with *any* warrant to arrest him, drew this deadly weapon and fired upon the sheriff, and we leave it to some other court to say that the shooting of the sheriff under such circumstances was justifiable, and that the person committing such violence ought not to be punished therefor.

The claim that a killing under such circumstances would not at least be manslaughter, is not a correct statement of the law. It is at least that, and as we view the record, it was murder in the first degree. Conceding the illegality of this warrant, yet this officer of this county was fully advised of the crime then charged against the plaintiff in error, and had a right, under the statutes of this state, to arrest him without a warrant and hold him until a legal warrant could be obtained, and the mere quibble touching the technicality of this warrant can not avail him to escape the consequences of the crime that he premeditated for hours preceding its accomplishment, for it clearly appears from this record that he had a fixed, settled and deadly purpose of killing any officer or any person armed with any warrant coming there to effect his arrest. We are surprised that a verdict of manslaughter instead of murder in the first degree was returned by the jury in this case, and if we were authorized to reverse the verdict for any reason that would not prejudice the state in the prosecution of this crime we would be glad to do so; but we are now dealing with errors assigned by the plaintiff in error, therefore the judgment of the common pleas court will be affirmed, with costs. Exceptions of plaintiff in error are noted.

F. V. Owen and *J. B. Graham*, for plaintiff in error.

L. C. Stillwell, Prosecuting Attorney, and *W. M. Koons*, for defendant in error.

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QUALIFICATIONS OF COUNCILMEN.

[Circuit Court of Butler County.]

STATE, EX REL ROBERT J. SHANK, v. HOMER GARD—QUO WARRANTO; AND FRED SHEARER v. BRANDON R. MILLIKIN
ET AL—INJUNCTION.

Decided, May 1, 1906.

Municipal Corporations—Qualifications of Members of Council—Inhibition against the Holding of any Other Office or Public Employment—Council the Judge of Election and Qualification of its Members—Words and Phrases—Construction of Sections 1536-612 and 1536-613.

1. The inhibition against the holding of other public office or employment, found in Section 120 of the municipal code (Revised Statutes, Section 1536-613), relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office and employment.
2. Where one is elected to council who is already serving in the office of school examiner and is further employed as superintendent of a public school, the election is a nullity by reason of his ineligibility, and council has the right to so determine without notice to the one so affected or the taking of any proceedings against him, and may proceed to fill the vacancy forthwith.

Shank filed in the circuit court a proceeding in *quo warranto*, setting forth that at the organization of the council of the city of Hamilton, on January 8, 1906, he was elected clerk thereof, and that the defendant, Homer Gard, had usurped the said office and was unlawfully holding it from the possession of the relator. The prayer was for ouster.

The answer denied the election of the relator and the alleged usurpation, and alleged that in May, 1903, the defendant was duly elected clerk of the council for a term of two years and until his successor was elected and qualified, and that on January 8, 1906, the defendant was legally re-elected to said office for the term of two years, and that he gave bond, qualified and is performing the duties of the office.

* Affirmed by the Supreme Court, without report, December 4, 1906.

The reply was substantially a denial of the new matter in the answer.

The determination of the issue thus presented was dependent upon the disputed title to a seat in council. The findings of fact as made by the circuit court were as follows:

That at the November election, 1904, Fred Shearer, an elector of the city of Hamilton, was elected for two years as a member at large of the city council of said city; that prior to and at the time of such election said Fred Shearer held a public office in Butler county, Ohio, to-wit, the office of member of the county board of school examiners, and held a public employment in said city of Hamilton, Ohio, to-wit, as school teacher in and principal of one of the ward schools of said city, and as such officer and employe received compensation in money for his services; that continuously from the time of his election as said member of council and up until the filing of this proceeding he held said public office and said employment.

That said Fred Shearer acted as such member of the city council until December 27, 1905, at which time a regular recessed meeting of council was held, of which meeting said Fred Shearer had full knowledge, and at which meeting the said city council by resolution found and determined that at the time of the election of Fred Shearer as such member of council and continuously thereafter to that time he was said public officer and held such public employment, and that by reason thereof at all of said times he did not possess the qualifications of a member of council provided and required by Section 120 of the Municipal Code of Ohio, and by said resolution at said time the office of Fred Shearer as member of said city council was declared vacant, and that said Brandon R. Millikin was at said meeting duly elected by said council to fill the office of member of council in place of said Fred Shearer, and thereupon at said meeting of December 27, 1905, said Brandon R. Millikin appeared, took the oath of office and qualified as such member of council, and took possession of said office, and thereafter discharged the duties thereof; and the minutes of said meeting were duly approved at the next subsequent meeting of council.

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That said Fred Shearer was not present at said meeting, and while he had knowledge of said meeting, he had no notice of the intended proceedings held by said city council, declaring him ineligible, and his office vacant, and the appointment of said Brandon R. Millikin.

The court finds that said city council met for organization January 8, 1906, at which time said Brandon R. Millikin was present as such member of council and that the president of council directed the then clerk, Homer Gard (the defendant), to call the roll of the members of the city council, which was done, and said Brandon Millikin's name was called and he answered to said roll, and thereupon council proceeded to elect a clerk, and the relator and defendant were both nominated for the office of clerk, and thereupon the president of council directed the roll to be called for said election, and said clerk did call said roll, including Brandon R. Millikin, and that four of the members of said council, including Brandon R. Millikin, voted for said defendant, and that three of the members thereof voted for Robert J. Shank, all of which is shown by the minutes of said council, and which minutes were duly approved at the next meeting of said council.

That at said last named meeting Fred Shearer was present, and that after the clerk had called the roll for the election of clerk, one J. P. Wilson, a member of said council, without the direction of any one, called the name of Fred Shearer, who responded by saying "Shank"; and the court finds that the calling of the name of Shearer by said Wilson does not appear on the minutes of said meeting. Thereupon the defendant was declared elected as such clerk of council, gave bond which was approved and filed, and entered into the possession and discharge of the duties of said office, and has since discharged the duties thereof.

That the relator subsequent to said meeting pretended to give bond as such clerk and demanded of the defendant the said office and books, documents, papers and property appertaining thereto, which said demand said defendant refused.

That said defendant, Fred Shearer, held said office of member of the board of county examiners and said employment as

school teacher of the Hamilton special school district at the time of his election, and that at his term of said office and of said employment terminated June, 1905, but that during the month of June, 1905, he was reappointed as a member of the board of county school examiners and re-engaged as a teacher by said school district, and without interval continued upon another term as such member of the board of county school examiners and as such teacher, and has acted as such continuously thereafter until the trial of this case.

Andrews, Harlan & Andrews, attorneys for the relator, contended—

“1. That Shearer was at least the *de facto* member of council, and that the proceeding of the city council December 27, 1905, adjudging him disqualified, declaring his office vacant and appointing a successor without charges, investigation, notice to Shearer or knowledge on his part, is a mere nullity; and that it makes no difference whether or not he was disqualified because of the positions he held either by their inherent incompatibility or by reason of a statute forbidding them. Citing: *State, ex rel, v. Bryce*, 7 O., 82 (Pt. 2); *Hogan v. Carberry*, 7 Rec., 595; 6 O. D. (reprint), 729; *Board of Aldermen v. Darrow*, 13 Col., 460; 16 Am. St., 215; *Oliver v. Mayor of Jersey City*, 48 L. R. A., 412; *Halgreen v. Campbell*, 82 Mich., 255; 21 Am. St., 557; *State, ex rel, v. Ed. F. Hewett*, 3 S. Dak., 187; 16 L. R. A., 415; *Commonwealth, ex rel, v. Slifer*, 25 Pa. St., 23; 64 Am. Dec., 680; *Jones v. State*, 28 Neb., 495; 7 L. R. A., 325; *State v. State Medical Examining Board*, 32 Minn., 324; 50 Am. Rep., 575; *State, ex rel, v. City of St. Louis*, 1 S. W., 757; *State v. Schultz*, 28 Pac., 643; *Hartigan v. Board of Regents*, 38 S. E., 698; *Dullam v. Wilson*, 53 Mich., 392; 51 Am. Rep., 128; *Carter v. City Council of Durango*, 27 Pac., 1057; *State, ex rel, v. Bryson*, 44 O. S., 457; *State, ex rel, v. McLean*, 58 O. S., 313; *State, ex rel, v. Sullivan*, 58 O. S., 504; *State, ex rel, v. Hawkins*, 44 O. S., 98; *Meachem v. Common Council of City of New Brunswick*, 62 Atlantic Reporter, 303; *Carr v. City Council of Augusta*, 52 Southern Reporter, 300; *State, ex rel, v. Hoglan*, 64 O. S., 532; *State v. Brice*, 7 O. S., 82 (Pt. 2); 4 Blackstone's Com., 282; *Murdock v. Trustees*, 12 Pick., 244; *State, ex rel, v. Darby*, 12 C. C., 235; affirmed, 52 O. S., 611; *State, ex rel, v. O'Bryan*, 47 O. S., 464; *Alderman v. Darrow*, 13 Col., 460; 16 Am. St., 215.

“2. In Ohio the doctrine prevails that a member of council chosen to an incompatible office, or an office forbidden to him,

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does not lose his membership in the city council, but his election or appointment to the second office is invalid. *State, ex rel, v. Kearns*, 47 O. S., 566; *State, ex rel. v. Taylor*, 12 O. S., 130; *Commissioners v. Cambridge*, 7 C. C., 72; *State v. Newark*, 6 N. P., 523; *State, ex rel, v. Brown*, 60 O. S., 499.

“3. Shearer was not disqualified under the law from holding at the same time the office of member of city council, member of county board of school examiners, and position of school teacher. *State v. Kinney*, 20 C. C., 325, and *State, ex rel, v. Brown*, 60 O. S., 499, were cited to establish the proposition that the public office or public employment forbidden to members of council is office under the municipality or employment by it; and the former construction shall be given to the revision known as the municipal code, in the absence of any clear indication that the Legislature intended to change the law in that respect. Citing: *Conger v. Barker*, 11 O. S., 1-13; *Ash v. Ash*, 19 O. S., 385-387; *Williams v. State*, 35 O. S., 175; *State, ex rel, v. Commissioners of Shelby Co.*, 36 O. S., 326-330; *Allan v. Russel*, 39 O. S., 336; *State, ex rel, v. Auditor*, 43 O. S., 311; *State, ex rel, v. Stockley*, 45 O. S., 304, 308-9; *Tyler's Executors v. Winslow*, 15 O. S., 364; *Hamilton v. Steamboat*, 16 O. S., 429; *Brower v. Hunt*, 18 O. S., 311-338; *City of Warren v. Davis*, 43 O. S., 447.

“A section of a revised statute must be confined in its construction as if it were still a part of the original act from which it was taken. *Eversole v. Shilker*, 50 O. S., 701.

“The letter of a statute is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. *Burgett v. Burgett*, 11 O. S., 469-481; *Tracy v. Card*, 2 O. S., 431-441; *Slater v. Cave*, 3 O. S., 80-85; *State v. Harmon*, 31 O. S., 250-264; *Brigel v. Starbuck*, 34 O. S., 280-285; *Johnson v. State*, 42 O. S., 207-210; *Board of Education v. Board of Education*, 46 O. S., 595-600-1.

“In the revision the Legislature has included ‘public employment’ as well as ‘public office’ as to disqualification; but the public employment referred to is employment by the municipality. There would be no reason or logic in a construction which would forbid a member of council from holding any other public office or public employment independent of the municipality, such as U. S. Commissioner, trustee of one of the state institutions, jury commissioner, clerk or deputy of the county offices, member of the grand jury, petit jury, for these are all either public offices or public employment; or from building for the county or acting as janitor of the court house and many others that may suggest themselves to the mind. Yet all these are forbidden to a member of council unless we construe

this provision as it has been construed before the revision to mean public office or employment by the municipality. There is philosophy in forbidding a member of council to have any public office or employment under the city authorities, because almost any duties rendered the city or emoluments received from the city would be incompatible with his office as member of council, but not so in other branches of the public service.

“But, it may be claimed that our contention to the former construction put by the courts on the statute, have been overthrown by the expression ‘except that of notary public or member of the state militia.’

“We maintain, however, that this exception only strengthens our position. It will be noted that the language is not except that of the office of notary public or office of member of the state militia (indeed the latter position is not an office at all), but the exception is that of the public employment of notary public or member of the state militia. That is, a member of the city council who may be a notary public or a member of the state militia shall not be disqualified as a member of council by his public employment either as a notary public or a member of the state militia by the city authorities.

“The purpose of the Legislature is to forbid the public employment of a member of the city council by the city authorities in any capacity whatever, and to provide that he shall not render any public service for the city without forfeiting his office as a member of council except that he may render public service for the city or its officers as a notary or as a member of the state militia without forfeiture of his office as a member of the city council for the reason that such public employment is of such a trivial, rare or exceptional character that it could not tempt or influence in the least his conduct as a member of the city council.

“It will be seen by an examination of Section 3096, *et seq.*, that the state militia may be called into the service of the city, and the purpose of this exception is that such call of a member of the state militia into the service of the city * * * such public employment in the service of the city should not work a forfeiture of his office in case he should be a member of the city council.

“Likewise a notary public may be employed by the city to acknowledge deeds, verify records and reports, administer oaths to public officers and many other acts as a notary public for which he may be paid out of the city treasury, and the purpose of the exception is to provide that such public employment of a notary shall not forfeit his office as a member of council.”

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The conclusion in the brief for the relator was, that if this contention is right then Shearer was on December 27 not only a *de facto* but also a *de jure* member of council; and whether a *de facto* member, or both a *de facto* and a *de jure* member, the action of council in attempting to declare his seat vacant and appoint a successor was a nullity.

R. N. Shotts, Warren Gard and W. C. Shepherd, in a brief on behalf of the defendant, contended that the question involved was controlled entirely by Sections 119 and 120 of the municipal code (R. S., 1536-612 and 613), and that there is no room for the application of any common law rules, claiming that the holding of any public office or employment disqualifies a person from being elected a member of council, and that after a lawful election as member of such body such holding of office or employment works a forfeiture of the office of councilman forthwith. The election and subsequent incumbency of Shearer were, therefore, a nullity and no motion or judicial determination was necessary. Citing: *State, ex rel, v. Craig*, 69 O. S., 236; *State, ex rel, v. Orr*, 61 O. S., 384; 23 Amer. & Ency. of Law, 338; *State v. Alderman* (Mo.), 3 S. W. Rep., 849; Mechem Public Offices, Sec. 428; *People v. Common Council*, 77 N. Y., 503; *Stearns v. Wyoming*, 53 O. S., 352; *State, ex rel, v. Berry*, 47 O. S., 232; *State v. Hawkins*, 44 O. S., 115; *People v. Mays*, 7 N. E., 660.

Delay on the part of council in filling the vacancy occasioned by Shearer's ineligibility is of no importance. Nothing that council or even Shearer could do would dispense with the statutory qualifications. *In re Corliss*, 11 R. L., 638; *Commonwealth v. Halter*, 1 Leg. Rec. Rep. (Pa.), 86; *Scarcy v. Grow*, 15 Cal., 117; *People v. Clute*, 50 N. Y., 451.

In opposition to *State v. Kinney*, 20 C. C., 325, the cases of *State v. Kearns*, 47 O. S., 566; *State v. McMillan*, 15 C. C., 163, and *State v. Wagner*, 19 C. C., 149, were cited.

It was further contended that the relator has no standing in court, because in order to prevail he must show that Millikin, who was appointed to fill the Shearer vacancy, had no title to the office of councilman, and relator's action being one to oust Gard, the title of Millikin, who was not a party to the proceed-

ing, could not be collaterally attacked. Citing: 4 Current Law, 861, Section 7; *Ex Parte Strang*, 21 O. S., 610; *Sitsky v. Newton*, 17 C. C., 482 (affirmed in 60 O. S., 605); *State v. Gardner*, 54 O. S., 24; *People v. Mays*, 7 N. E. Rep., 660.

The conclusion of counsel for the defendant was that Shearer, by reason of holding another public office and employment, was ineligible to be elected a member of council; that his election was a nullity; that no action on the part of council was necessary to create a vacancy, and the appointment of Millikin to fill the vacancy was valid; and, moreover, that the relator could not in this collateral proceeding attack Millikin's title.

The conclusions of law as made by the circuit court, were as follows:

“As conclusions of law the court finds that Fred Shearer, at no time between his election and the hearing of the cause, had the qualifications of a member of council required by law, and that his election and pretended incumbency of the office of councilman were a nullity, and that council had the right to determine this matter without notice to said Fred Shearer or taking any proceedings against him, and that the election of Brandon R. Millikin to fill said vacancy was duly and legally held, and that Homer Gard, the defendant, was legally elected as such clerk, and that the relator was not elected clerk, and is not entitled to any of the relief prayed for. It is therefore considered, adjudged and decreed that the relator's petition be and the same is hereby dismissed, and that defendant recover of relator his costs expended in this action, taxed at \$——; to which decision of the court said relator excepts.”

The opinion of the court was as follows:

JELKE, P. J.; SWING, J., and GIFFEN, J., concur.

This is not a case involving the expulsion of a member of council, who being legally qualified has been duly elected and installed in office. Section 121 of the municipal code has no application to the case at bar. We are of opinion that at no time between his election and the hearing of this case did Fred Shearer have the qualifications of a member of council provided and required by Section 120 of the municipal code. He held the public office of school examiner and the public employment of superintendent of one of the Hamilton public schools before the

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election and continuously during the entire time of his pretended incumbency as member of council, in contravention of the provision:

“Every member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city.”

We are of the opinion that the inhibition against persons holding public office or employment is not limited to office in or employment by the municipality, but extends to all public office and employment. This is evidenced by the exception of notaries public and members of the militia.

Having come to this conclusion, the case of *State, ex rel Attorney-General, v. Craig*, 69 O. S., 236, applies:

“Where the appointment to an office is a nullity, for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made, without first ousting such first appointee by proceedings in quo warranto.”

Fred Shearer's election and pretended incumbency of the office of councilman were a nullity, and on December 27, 1905, council had the right under Sections 119 and 120 of the municipal code to determine this matter without notice to Fred Shearer or taking any proceedings against him, and to fill the vacancy forthwith by the election of Brandon R. Millikin.

The prayers in both the quo warranto and injunction suits above set forth will be denied and the petitions dismissed.

Andrews, Harlan & Andrews, Shank & Shank, and Neilan & Neilan, for plaintiff in error.

R. N. Shotts, Warren Gard and W. C. Shepherd, for defendant in error.

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The dismissal of a suit for damages is a sufficient consideration for a contract for future employment. 521.

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Section 1230*b*, relating to fees and compensation of sheriff in counties of 22,500 or more, is unconstitutional for lack of uniformity of operation. 73.

Section 6454, giving to the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for want of uniform operation. 93.

A statutory provision which abrogates the common law rule as to existing rights with reference to lateral support, is unconstitutional. 150.

The act of March 24, 1904, authorizing county commissioners to remove bridges which have been condemned by the War Department under authority of law as an obstruction to navigation, and rebuild them in accordance with plans for the improvement of navigation, is a valid law, and the order of the Secretary of War with reference to the county bridge over the Ashtabula river, in the city of Ashtabula, was a valid order. 169.

Section 3631*a* is not unconstitutional in that it confers upon an association of the character of a mutual burial association rights and privileges differing from those bestowed upon other

associations doing a similar business. 233.

Section 2834*b*, relating to restrictions in the levying of taxes, in so far as it applies to boards of education is unconstitutional for lack of uniformity of operation, and failure of a board of education to comply with its requirements in incurring an obligation does not render the obligation void. 305.

Section 1038*a*, relating to deductions from the tax list and duplicate for destroyed or injured buildings, is in accordance with the long settled policy of the state and a valid enactment, notwithstanding the constitutional provision as to the taxing of all property by a uniform rule according to its true value in money. 366.

It is an established rule of courts that the question of the constitutionality of a statute or the validity of an ordinance will not be determined, unless a case is presented which makes such determination necessary. 437.

Section 1365-25, giving to county commissioners power to extend time for payment of taxes thirty days, at their discretion, held constitutional, although limited to "counties containing a city of the second grade of the first class." 553.

The county depository act (98 O. L., 274) is constitutional. 567.

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The circuit court has jurisdiction in habeas corpus in the case of one committed for contempt by a common pleas judge, who was without jurisdiction in the premises. 212.

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torney to a command of court to enter a *nolle prosequi* in a certain case is not punishable summarily, but only under the procedure provided by Section 5641. and unless this procedure is followed the court is without jurisdiction to punish for a contempt thus committed. 212.

Charges affecting the court may be strictly or substantially true and yet involve the one making them in contempt, if they are not made in due course of procedure and for justifiable ends. 357.

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Failure through inadvertence to file an auditor's certificate that the money necessary to pay for a county bridge is in the treasury, as required by Section 2834b, does not necessarily render the contract void to such an extent that no rights or liabilities can grow out of the transaction. 216.

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water tower where the work did not come up to the specifications. 387.

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County commissioners are without authority to locate and establish a ditch in a township ditch, until there has been a refusal by the township trustees to act, as provided in Section 4510. 364.

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Where a decree of divorce has been entered against a husband, with an order to pay alimony in installments until a stipulated sum has been paid, the order as to alimony can not be defeated or a commitment to jail avoided by a second marriage and the setting up of the claim that all of his meager salary is required to support his new family. 550.

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In the absence of a statutory provision expressly conferring the right of eminent domain upon foreign corporations, a foreign telephone company is without the right to condemn private property for purely local purposes and not as a part of an interstate system. 81.

The petition of a private corporation claiming the right of eminent domain must clearly set forth the grounds upon which its claims rest, and these allegations must be clearly proved. 81.

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Of the valuation of the lots in newly platted subdivision with those of adjacent lots and lands; rule which should govern the assessor; remedy of the property owner. 502.

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Will not favor a late assertion of the stale rights of a land owner, who has permitted the adjoining owner to expend a large sum of money in a building which extends over the line, without protest or any attempt to assert his rights for a long period; such a complainant will be left to his remedy at law. 481.

An action in which it is sought to have a deed declared a mortgage and the mortgage foreclosed is an equitable action. 488.

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The circuit court has jurisdiction to review an order made by the common pleas on appeal from the overruling by a justice of the peace of a motion to discharge an attachment. 97.

Use of the words proximate cause of death, in a charge to the jury, in the sense of sole cause of death, was not erroneous in view of other qualifying and restrictive words used in the same connection. 201.

The incongruity presented, in the charge to the jury as to burden of proof in this case, held

not to be ground for reversal. 201.

The giving of a wrong reason by a trial judge for the exclusion of certain testimony is not ground for reversal, where it appears that the exclusion was itself proper. 260.

In the admission of evidence to overcome a claim of adverse possession; in a charge of court in an action for recovery of property claimed by adverse possession. 265.

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In the admission of testimony as to an act of negligence not specifically alleged and for which the door had not been opened by any general allegation. 342.

A charge of court is erroneous which bases the question of negligence on the failure of a railway crossing watchman to signal danger, independent of the fact that the decedent depended on the watchman rather than on his own faculties to discover whether a train was approaching. 353.

Proper order where a case has been carried on appeal from county commissioners to probate court and thence on error to the common pleas. 364.

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The proprietor of a body of water is under no higher duty toward infant than toward adult trespassers, where the water is so situated as to present no circumstances specially enticing or hazardous to children whereby they are led by their infantile instincts to incur danger from drowning. 509.

Amounting to waste of the estate. 533.

Habitual use by pedestrians of a foot-path through a switchyard with the acquiescence of the railroad company; company held liable for injuries to one who was using the path at night and was struck by a locomotive running noiselessly and without headlight. 569.

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Where no demand is made for a stenographer in a criminal trial, but a mere inquiry is made on behalf of the defendant as to whether there will be one present, it is not prejudicial error to go to trial without one. 93.

A motion to take from the jury an entire answer as unresponsive is properly overruled, where a part of the answer is directly responsive and the remainder is not prejudicial. 297.

Proper finding for the jury in an action under a contract for the rebuilding of a water tower, where the work did not come up to the specifications. 387.

TRUSTS—

Property held in trust for a fraternal order; rights of the *cestuis trustent*; seceders from the order can not establish their right to the trust property by an action in court, but must invoke procedure within the organization. 529.

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In a prosecution for illegal fishing from the shore of an island lying in an unnavigable stream forming the boundary between two counties. 390.

Where affidavits for a change of, are filed, the trial judge is not without discretion, but must de-

termine from the affidavits whether a change should be granted. 537.

No abuse of discretion in denying a motion for a change of venue, where it appears from the record that but one juror was examined on his *voir dire* and he was challenged for cause. 537.

VERDICT—

A special finding by a jury to the effect that the plaintiff in a negligent case was under the control of a foreman who is named, does not entitle the defendant to a judgment on the ground that the accident happened in a different department to which the duties of the plaintiff had taken him for the time being. 64.

A verdict of \$13,500 for injuries of a disabling character to a locomotive engineer does not in this case indicate passion or prejudice or show any such error in computation as would require a remittur. 137.

A verdict of \$1,200 for severe injuries to an aged and infirm man, where due to the premature starting of a car from which he was attempting to alight, not excessive. 271.

A request for a specific verdict renders it necessary that the jury be fully instructed as to the facts which they are required to find, and this necessity is not met by the general instruction that they must find the facts necessary to determine the case. 387.

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WARRANTY—

In the sale of personalty; where an article which is not accessible for examination is sold for a spe-

cific purpose, there is an implied warranty that it is suited to the purpose for which it is to be used. 417.

Testimony that an agent who sold an article to be used for a specific purpose was without authority to warrant it is immaterial in the absence of any notice to the purchaser of the lack of such authority. 417.

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When an adverse claimant is threatening acts which will result in waste to the estate, a plaintiff in possession is entitled to an injunction until such time as the defendant has established his title by a suit at law; trespass which amounts to waste. 533.

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Where an unnavigable stream forms the boundary line between two counties, and there is an island in the stream. 390.

The proprietor of a body of water so situated as to present no circumstances specially enticing or hazardous to children, whereby they are led by their infantile instincts to incur danger of drowning, is under no higher duty to infant trespassers or licensees than to adults. 509.

The use of a sewer for carrying sewage, even in the slightest degree, is in derogation of the rights of an abutting land owner whose property is traversed by the stream into which the sewer empties, and may be enjoined by the land owner without waiting until he has suffered material damage, unless the right has been acquired by appropriation or otherwise. 577.

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The fact that a husband and wife separate and live apart for a number of years does not destroy her right to exemption as a widow. 294.

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